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Crime prevention and criminal justice

Note by the Secretariat*

Pursuant to the request in paragraph 6 of General Assembly resolution 55/61 of 4 December 2000, the Secretariat has the honour to transmit, through the Economic and Social Council, to the General Assembly the report of the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption (A/AC.260/2 and Corr.1), held in Vienna from 30 July to 3 August 2001. The report was approved by the Commission on Crime Prevention and Criminal Justice at its tenth session on 6 September 2001.

* On 6 September 2001, the Commission on Crime Prevention and Criminal Justice at its tenth session, on the recommendation of the Expert Group, approved for transmission through the Economic and Social Council to the General Assembly at its fifty-sixth session for adoption a draft resolution entitled "Terms of reference for the negotiation of an international legal instrument against corruption" (*Official Records of the Economic and Social Council, 2001, Supplement No. 10* (E/2001/30/Rev.1), part two, chap. I, sect. A, draft resolution I).

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Report of the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption

Contents

		Paragraphs	Page
I.	Introduction	1-4	3
II.	Matters calling for action by the General Assembly	5	3
III.	Organization of the meeting	6-12	5
	A. Opening of the meeting	6-8	5
	B. Attendance	9	6
	C. Election of officers	10	6
	D. Adoption of the agenda and organization of work	11	6
	E. Documentation	12	6
IV.	Summary of the discussion	13-33	6
V.	Presentation on the Global Programme against Corruption	34-35	11
VI.	Informal consultations	36-37	11
VII.	Adoption of the report of the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption	38-45	11

Annexes

I.	List of participants	13
II.	List of documents before the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption	18

I. Introduction

1. In its resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime[1] was desirable; decided to begin the elaboration of such an instrument in Vienna at the headquarters of the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention; requested the Secretary-General to prepare a report analysing all relevant international instruments, other documents and recommendations addressing corruption and to submit it to the Commission on Crime Prevention and Criminal Justice; and requested the Commission, at its tenth session, to review and assess the report of the Secretary-General and, on that basis, to provide recommendations and guidance as to future work on the development of a legal instrument against corruption.

2. In the same resolution, the General Assembly requested the Secretary-General to convene, upon completion of the negotiation of the United Nations Convention against Transnational Organized Crime and the related protocols, an intergovernmental open-ended expert group to examine and prepare, on the basis of the report of the Secretary-General and of the recommendations of the Commission at its tenth session, draft terms of reference for the negotiation of the future legal instrument against corruption.

3. In its resolution 55/188 of 20 December 2000, the General Assembly reiterated its request to the Secretary-General, as contained in resolution 55/61, to convene an intergovernmental open-ended expert group to examine and prepare draft terms of reference for the negotiation of the future legal instrument against corruption, and invited the expert group to examine the question of illegally transferred funds and the return of such funds to the countries of origin.

4. The Economic and Social Council, upon the recommendation of the Commission on Crime Prevention and Criminal Justice at its tenth session, adopted resolution 2001/13 of 24 July 2001, entitled "Strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and in returning such funds". In that resolution, the Council requested the intergovernmental open-ended expert group referred to in General Assembly resolution 55/61 to consider, within the context of its mandates, the following issues, inter alia, as possible items of work to be included in the draft terms of reference for the negotiation of a future legal instrument against corruption: (a) strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, including the laundering of funds derived from acts of corruption, and promoting ways and means of enabling the return of such funds; (b) developing the measures necessary to ensure that those working in banking systems and other financial institutions contribute to the prevention of the transfer of funds of illicit origin derived from acts of corruption, for example, by recording transactions in a transparent manner, and to facilitate the return of those funds; (c) defining funds derived from acts of corruption as proceeds of crime and establishing that an act of corruption may be a predicate offence in relation to money-laundering; and (d) determining the appropriate countries to which funds, referred to above, should be returned and the appropriate procedures for such return.

II. Matters calling for action by the General Assembly

5. Pursuant to General Assembly resolution 55/61, the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption brings to the attention of the General Assembly at its fifty-sixth session, through the Commission on Crime Prevention and Criminal Justice at its reconvened tenth session and the Economic and Social Council, the following draft resolution for its consideration and action:

Terms of reference for the negotiation of the United Nations convention against corruption

The General Assembly,

Concerned about the seriousness of problems posed by corruption, which may endanger the stability

[1] General Assembly resolution 55/25, annex.

and security of societies, undermine the values of democracy and morality and jeopardize social, economic and political development,

Recalling its resolution 51/59 of 12 December 1996, by which it adopted the International Code of Conduct for Public Officials, recommending the Code to Member States as a tool to guide their efforts against corruption,

Recalling also its resolution 51/191 of 12 December 1996, by which it adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions,

Recalling further its resolution 55/61 of 4 December 2000, in which it established an ad hoc committee for the negotiation of an effective international legal instrument against corruption, and requested the Secretary-General to convene an intergovernmental open-ended expert group to examine and prepare draft terms of reference for the negotiation of such an instrument,

Recalling its resolution 55/188 of 20 December 2000, in which it invited the intergovernmental open-ended expert group convened pursuant to resolution 55/61 to examine the question of illegally transferred funds and the return of such funds to the country of origin,

Recalling also Economic and Social Council resolution 2001/13 of 24 July 2001, entitled "Strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and in returning such funds",[2]

Reiterating the need to prepare a broad and effective international legal instrument against corruption,

Taking note of the report of the Secretary-General on existing international legal instruments, recommendations and other documents addressing corruption,[3] submitted to the Commission on Crime Prevention and Criminal Justice at its tenth session and before the meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption,

1. *Takes note with appreciation* of the report of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption, which met in Vienna from 30 July to 3 August 2001,[4] as endorsed by the Commission on Crime Prevention and Criminal Justice at its resumed tenth session and by the Economic and Social Council;

2. *Decides* that the ad hoc committee established pursuant to General Assembly resolution 55/61 shall negotiate a broad and effective convention, which, subject to the final determination of its title, shall be referred to as the "United Nations Convention against Corruption";

3. *Requests* the ad hoc committee, in developing the draft convention, to adopt a comprehensive and multidisciplinary approach and to consider, inter alia, the following indicative elements: definitions; scope; protection of sovereignty; preventive measures; criminalization; sanctions and remedies; confiscation and seizure; jurisdiction; liability of legal persons; protection of witnesses and victims; promoting and strengthening international cooperation; preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds; technical assistance; collection, exchange and analysis of information; and mechanisms for monitoring implementation;

4. *Invites* the ad hoc committee to draw on the report of the Intergovernmental Open-Ended Expert Group, on the report of the Secretary-General on existing international legal instruments, recommendations and other documents addressing corruption,[3] as well as on the relevant parts of the report of the Commission on Crime Prevention and Criminal Justice on its tenth session,[2] and in particular on paragraph 1 of Economic and Social Council resolution 2001/13 as resource materials in the accomplishment of its tasks;

5. *Requests* the ad hoc committee to take into consideration existing international legal instruments against corruption and, whenever relevant, the United Nations Convention against Transnational Organized Crime;[1]

6. *Decides* that the ad hoc committee shall be convened in Vienna in 2002 and 2003, as required, and

[2] See E/2001/30 and Corr.1, chap. I, sect. B.III.

[3] E/CN.15/2001/3 and Corr.1.

[4] A/AC.260/2.

shall hold no fewer than three sessions of two weeks each per year, within the overall approved appropriations of the programme budget for the biennium 2002-2003, according to a schedule to be drawn up by its bureau, and requests the ad hoc committee to complete its work by the end of 2003;

7. *Also decides* that the bureau of the ad hoc committee shall be elected by the committee itself and shall consist of two representatives from each of the five regional groups,

8. *Invites* donor countries to assist the United Nations in ensuring the full and effective participation of developing countries, in particular least developed countries, in the work of the ad hoc committee, including by covering travel and local expenses;

9. *Urges* States to be fully involved in the negotiation of the convention and to endeavour to ensure continuity in their representation;

10. *Invites* the ad hoc committee to take into consideration the contributions of non-governmental organizations and civil society, in accordance with United Nations rules and following the practice established by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime;

11. *Accepts with gratitude* the offer of the Government of Argentina to host an informal preparatory meeting of the ad hoc committee established pursuant to resolution 55/61, prior to its first session;

12. *Requests* the ad hoc committee to submit progress reports on its work to the Commission on Crime Prevention and Criminal Justice at its eleventh and twelfth sessions, in 2002 and 2003, respectively;

13. *Requests* the Secretary-General to provide the ad hoc committee with the necessary facilities and resources to support its work.

III. Organization of the meeting

A. Opening of the meeting

6. The Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of a Future Legal Instrument against Corruption was held in Vienna from 30 July to 3 August 2001. The Intergovernmental Open-Ended Expert Group held five plenary meetings and four informal consultations.

7. Following the election of officers (see para. 10), the Chairman invited the Executive Director of the Office for Drug Control and Crime Prevention of the Secretariat to make an opening statement.

8. In his opening statement, the Executive Director of the Office for Drug Control and Crime Prevention stated that corruption was a phenomenon that dated from the very beginnings of organized human society. Corruption was as much a reality in industrialized countries as in countries with economies in transition and developing countries. While in recent times the number of cases of large-scale corruption had been growing, large-scale theft of public money was not the only form of corruption. Millions of people lived in places where they were obliged to pay bribes to obtain services that were considered a right under the law. Over time, corrupt practices reinforced poverty by making services available only to those who could afford them. Over the past 10 years, public resistance had begun to solidify against the more outrageous forms of corruption and political consensus to form, along with a deeper understanding of the links between corruption and poverty. The International Code of Conduct for Public Officials and the United Nations Declaration against Corruption and Bribery in International Commercial Transactions, adopted by the General Assembly in 1996 (see resolutions 51/59 and 51/191, respectively), as well as the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development (OECD) on 21 November 1997, and other regional initiatives were proof of the shift in political consensus and public opinion. Political consensus, development policy and public opinion had converged around the demand that the law must apply to everyone. There was general agreement that corruption must be approached simultaneously from several sides. The spirit that had made possible the finalization of the United Nations Convention against Transnational Organized Crime was a solid basis for the development of a new global instrument that could propel the international community one important step further in the dynamic process of changing corruption from the secret that everyone knew about into the

public enemy that the international community was determined to defeat.

B. Attendance

9. The Meeting of the Intergovernmental Open-Ended Expert Group was attended by representatives of 97 States. Also attending the Meeting were observers for organizations of the United Nations system, institutes of the United Nations Crime Prevention and Criminal Justice Programme network, intergovernmental organizations and non-governmental organizations. A list of participants is contained in annex I to the present report.

C. Election of officers

10. The Meeting elected the following officers by acclamation:

Chairman: T. P. Sreenivasan (India)

Vice-Chairmen: Olga Pellicer Silva (Mexico)
Abdulkadir Bin Rimdap (Nigeria)
Cedric Janssens de Bisthoven (Belgium)

Rapporteur: Anna Grupinska (Poland)

D. Adoption of the agenda and organization of work

11. At its first meeting, on 30 July 2001, the Intergovernmental Open-Ended Expert Group adopted the following agenda:

1. Opening of the Meeting.
2. Election of officers.
3. Adoption of the agenda and organization of work.
4. Preparation of draft terms of reference for the negotiation of an international legal instrument against corruption.
5. Conclusions and recommendations and adoption of the report of the Meeting.

E. Documentation

12. A list of documents is contained in annex II to the present report.

IV. Summary of the discussion

13. Turning the attention of the Intergovernmental Open-Ended Expert Group to item 4 of its agenda, the Chairman suggested that the draft terms of reference the Expert Group had been mandated to prepare should achieve the following two objectives: (a) to provide organizational guidance that would ensure a successful negotiating process, giving the Ad Hoc Committee for the Negotiation of an International Legal Instrument against Corruption, established pursuant to General Assembly resolution 55/61, sufficient flexibility to fulfil its tasks, while enabling the Secretariat to service it in an efficient manner; and (b) to provide a workable and flexible framework that would guide the Ad Hoc Committee in developing the new international legal instrument, taking into account the views and concerns of all States. In order to achieve those objectives, the Chairman proposed that the Expert Group first hear the statements of the representatives of regional groups and then conduct a general discussion. Upon completion of that general discussion, the Chairman intended, in consultation with the members of the Bureau, to summarize the main elements of the draft terms of reference in a draft resolution, which he would submit to the Expert Group for consideration and action.

14. The representative of Egypt, speaking on behalf of the Group of 77 and China, stressed the great importance attached by the members of the Group of 77 and China to the development of an effective and binding international legal instrument against corruption in order to tackle corruption more effectively and efficiently as well as to help Member States in building integrity to prevent and fight corruption and to face the challenges posed by transnational corruption. The terms of reference for the future legal instrument should include, inter alia, broad definitions, including all aspects relating to public and private corruption; a broad scope of application; a set of preventive measures; a chapter on criminalization of acts of corruption; and a chapter on mutual legal assistance and cooperation that would foster international

cooperation, exchange of information that would facilitate tracing of funds and transfer of funds of illicit origin connected with corruption in order to ensure the repatriation of those funds, forfeiture and confiscation of the proceeds from corruption and the possibility of shifting the burden of proof and banking secrecy, and the rendering of technical assistance, especially to developing countries. An international follow-up mechanism should be considered to ensure implementation of those initiatives. The Group of 77 and China were of the view that the Bureau of the Ad Hoc Committee should be elected by the Committee itself in such a way as to ensure equitable regional representation and that the Ad Hoc Committee should complete its work in 2003.

15. The representative of Uruguay, speaking on behalf of the Group of Latin American and Caribbean States, confirmed the commitment of the members of the Group to participate actively in the fight against corruption and stressed the need to codify and strengthen international rules against the phenomenon in order to ensure transparency in both the public and the private sector. The members of the Group expressed the view that the instrument referred to in General Assembly resolution 55/61 should be an independent, binding instrument, which should have the form of a convention. While leaving to the Ad Hoc Committee established pursuant to resolution 55/61 the substantive discussion on the theoretical and practical aspects of the convention, the members of the Group were of the view that the Expert Group should identify the basic framework to guide the work of the Ad Hoc Committee. In that connection, the following elements were identified by the members of the Group for possible inclusion in the new convention: definitions, which should include aspects related to the definition of civil servants as well as to the concept of public service and corporate activities related to it; effective measures for the prevention, control and fight against corruption in both the public and private sector, including the involvement of civil society, the training of civil servants, the establishment of mechanisms to protect so-called "whistle-blowers" and the establishment of national independent anti-corruption bodies; scope of application; criminalization, which should include transnational bribery, illicit enrichment and laundering of the proceeds of corruption; liability of legal and natural persons; international cooperation, including exchange of information, training, extradition and mutual legal assistance; measures to prevent and fight the transfer of funds of illicit origin and the laundering of proceeds derived from corruption activities, as well as measures to facilitate the repatriation of such funds; technical assistance; and the establishment of a multilateral mechanism to monitor the application of the convention.

16. The representative of Belgium addressed the Expert Group on behalf of the States members of the European Union. Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Poland, Slovakia and Turkey also associated themselves with the statement. The representative of Belgium, after commending the United Nations Convention against Transnational Organized Crime and the report of the Secretary-General on existing international legal instruments, recommendations and other documents addressing corruption (E/CN.15/2001/3 and Corr.1), made reference to the Final Declaration of the Second Global Forum on Fighting Corruption and Safeguarding Integrity, held in The Hague from 28 to 31 May 2001, which contained important elements for the work of the Expert Group, as well as to the different instruments developed within the framework of the European Union, as they could provide expertise in the development of a global strategy against corruption. The members of the European Union emphasized that the new instrument should set high global standards and should be compatible with the principles of existing anti-corruption instruments. The members of the Union underlined that as many countries as possible should be able to subscribe to the commitment to be expressed in the new instrument and that there should be an open dialogue among countries during the negotiation process, paying particular attention to the concerns of developing countries and countries with economies in transition. The States members of the European Union expressed the view that the new instrument could be nothing else but a convention, should contain both preventive and enforcement measures and follow a multidisciplinary approach. In addition, the following main elements were identified for possible inclusion in the new instrument: criminalization; prevention; technical assistance; and a monitoring mechanism. Regarding criminalization, reference was made to the instruments developed by the Council of Europe, the European Union and OECD. The new instrument should follow a broad and flexible approach and cover active and passive corruption in

the public sector, of both national and foreign civil servants, including international civil servants. Likewise, the mandate of the ad hoc committee should include discussion of active and passive corruption in the private sector, as well as other offences connected to corruption. The new instrument should address laundering of the proceeds of corruption and their seizure and confiscation as well as international cooperation in that regard. The provisions of the United Nations Convention against Transnational Organized Crime represented a good example to follow. Its provisions on criminal law and procedure, such as penalties, protection of witnesses, responsibility of legal persons and international cooperation, could provide further guidance. The question of the return of funds of illicit origin should also be addressed in an effective and satisfactory manner. The European Union stressed that criminalization and sanction models should respect human rights and fundamental freedoms. Regarding prevention, the European Union was of the view that preventive measures were necessary to develop a global strategy against corruption and that they should be based on fundamental principles, such as good governance, integrity and transparency. They are of the highest importance in such matters as transparency of public procurement, international standards of auditing and accounts, prohibition of tax allowances, company law and codes of conduct. The European Union considered it important also to include mechanisms to provide technical assistance to developing countries and countries with economies in transition, as well as the establishment of a monitoring mechanism, which should be based on the equality of obligations and be effective and flexible. More specifically, the European Union could not accept criminalization models that were based on reversal of the burden of proof, which was contrary to the European Convention on Human Rights.

17. The representative of Morocco, speaking on behalf of the Group of African States, stated that there was consensus in the international community that urgent and serious action against corruption must be taken, at both the national and the international level. According to the Group, the future instrument against corruption should be independent, comprehensive and internationally binding. The purpose and scope of the instrument would make it possible to launch an effective fight against all forms of corruption, at the national and international levels, with prevention, detection, investigation, punishment and eradication of corruption; and to identify means to facilitate and regulate cooperation between States for the attainment of the objectives of the instrument. Its scope of application should include all forms of corruption. The definitions should address the concept of corruption in the broadest sense possible. The representative of Morocco stressed that prevention and law enforcement were equally crucial elements in the fight against corruption and should be reflected in the future legal instrument. Penal sanctions should be supplemented by disciplinary, administrative and civil law sanctions. The Group of African States also stressed the need to strengthen cooperation between law enforcement agencies, the reinforcement of mutual legal assistance and the bridging of differences in legal systems. In addition, the future instrument should contain provisions on money-laundering and on the return of the proceeds of corruption and illegally transferred funds. The Group of African States requested the Ad Hoc Committee to complete its work not later than 2003.

18. The representative of Jordan, speaking on behalf of the Group of Asian and Pacific States, endorsed the statement made by the representative of Egypt on behalf of the Group of 77 and China and expressed deep concern about the spread of corruption, which undermined society and its development, affecting in particular the poor. The members of the Group of Asian and Pacific States affirmed that they attach great importance to the development of the future international legal instrument against corruption and that they believed that the outcome of the Expert Group Meeting would play a central role in laying down the parameters for the development of an effective, credible, independent and binding instrument. According to the members of the Group, there should be a clear definition of corruption that covered both the private and public sectors and that the process of drafting the new instrument should be driven by the same considerations that had characterized the negotiations of the United Nations Convention against Transnational Organized Crime. The Group believed that the primary aim of the new convention should be to foster international cooperation. However, particular care should be taken that the integrity of domestic legal systems was not compromised. The Group believed that the scope of application of the new convention

must be responsive to the concerns of all States, particularly on the sensitive issue of sovereign equality, territorial integrity and non-interference in the domestic affairs of States.

19. The representative of Japan stated that his country could not fully associate itself with the statement made by the representative of Jordan on behalf of the Group of Asian and Pacific States, insofar as that representative had endorsed the statement of the representative of Egypt on behalf of the Group of 77 and China.

20. In order to facilitate the work of the Expert Group, the Chairman, following consultations with the members of the Bureau, proposed that the discussion be structured along the following lines: (a) nature of the international legal instrument against corruption; (b) matters pertaining to the content of the new instrument, for possible consideration by the Ad Hoc Committee; and (c) matters pertaining to the procedure to be followed for the negotiation process.

21. During the discussion that ensued, consensus emerged on the fact that the instrument should be a convention and numerous speakers supported the proposal that its title should be "United Nations Convention against Corruption". Some delegations felt that the title should contain some reference to the concepts of safeguarding integrity and promoting good governance.

22. Several delegations pointed out that key principles constituting the rationale and philosophical basis of the new draft convention should be enunciated, perhaps in a preamble.

23. Other delegations stressed the usefulness of not excluding the possibility that there might eventually be an annex or protocol to the new convention, which could include, for example, a code of conduct or code of ethics, that would apply, inter alia, to public officials. Some other delegations questioned whether the group of experts should be suggesting an annex or protocol at the current stage. According to some delegations, another issue that would need to be considered was the relationship of the new convention to existing conventions.

24. Some delegations pointed out that the new convention should be developed with full respect for the principles of sovereignty, territorial integrity and non-interference in the internal affairs of States and with appreciation for differing legal systems.

25. It was pointed out that the new convention should be developed taking into account existing international legal instruments against corruption in order to ensure consistency and avoid unnecessary duplication. It was deemed important to ensure that the new convention would build on the achievements of those instruments and not set lower standards. Further, it was pointed out that the United Nations Convention against Transnational Organized Crime contained many provisions that encompassed useful solutions and represented significant achievements, reached by consensus. To the extent appropriate, the new convention should make full use of those provisions in order to facilitate and expedite the process of negotiation.

26. As regards the possible content of the new convention, there was general agreement that the Expert Group should be mindful of its mandate, which was to prepare draft terms of reference for the negotiation of the new convention. In that connection, there was consensus that it was essential to ensure that the ad hoc committee established pursuant to General Assembly resolution 55/61 be vested with maximum flexibility, as a key condition for the successful fulfilment of its assigned tasks. With that in mind and assisted by an informal discussion paper submitted to it by the Chairman in consultation with the other members of the Bureau, the Expert Group focused its discussion on a number of elements for consideration by the ad hoc committee. Those elements were definitions; scope; criminalization; prevention; sanctions; confiscation and seizure; international cooperation, including extradition, mutual legal assistance and law enforcement cooperation and exchange of information; technical assistance; transfer of funds of illicit origin and return of such funds; and mechanisms for monitoring implementation. The Expert Group felt that the list of elements should include jurisdiction, liability of legal persons, collection, exchange and analysis of information and protection of witnesses and victims. There was general agreement that the list was not intended to be exhaustive and that the final determination of which elements would be discussed and in what form was incumbent upon the ad hoc committee, which was the body mandated by the General Assembly to negotiate the new convention.

27. Some delegations were of the view that the new convention should be a broad-based instrument encompassing all forms of corruption. In particular, some delegations made reference to the need to cover public and private, active and passive corruption, trafficking in influence, international bribery, improper use of state property, obstruction of justice and abuse of power. According to some other delegations, the new convention should apply to domestic, foreign and international civil servants, as well as to politicians. Some other delegations expressed the view that there should be a definition of those performing a "public function", to whom the new convention should also extend. Other delegations advised caution, because attempting to broaden the approach excessively was fraught with many conceptual, legal and policy-related difficulties. That discussion notwithstanding, there was broad support for a comprehensive and multidisciplinary approach in developing the new convention.

28. Some delegations stressed the importance of including civil and administrative law measures in addition to criminal provisions. They considered that such an approach would provide a higher probability of efficiency and effectiveness, because of the multifaceted nature of corruption and the need to address those issues under diverse legal systems. In that connection, some delegations made reference to the need to include in the new convention civil and criminal liability, remedies and sanctions, in addition to relevant preventive measures. In the view of some delegations, criminal law measures against corruption would need to include the reversal of the burden of proof and the lifting of bank secrecy. According to other delegations, criminalization of illicit enrichment was also necessary. Other delegations voiced concern regarding the reversal of the onus of proof, as that would run contrary to constitutional principles or international obligations and would thus be difficult to envisage.

29. It was the general view of the Expert Group that prevention should be an important element of the new convention. It was therefore essential to strike a balance between prevention and enforcement measures in developing the new instrument. Prevention was perceived by some delegations as including the promotion of integrity, transparency and good governance. Specific preventive measures could include development of codes of conduct or ethics, an effective and impartial civil service, effective systems for financing political parties, establishment of independent oversight bodies, free and transparent media, transparent public procurement rules, effective regulation of financial systems, denial of tax deductibility of bribes, an independent judiciary and the effective implementation of the rule of law. In that context, some delegations, however, stressed the point that in that area the group should not duplicate the work already done by United Nations institutions and other international organizations of a global nature (e.g., the World Trade Organization or the World Bank). Many delegations expressed the view that, in order to be effective, prevention should address the social and economic factors that were associated with corruption. Many delegations also stressed the importance of both the involvement and participation of civil society in preventing corruption and the promotion of public awareness. In that connection, the view was expressed that the ad hoc committee should take into account the contributions of non-governmental organizations, as well as those of national and regional auditing bodies.

30. Many delegations deemed it essential that the new convention effectively address the question of the transfer of funds or assets of illicit origin derived from acts of corruption and the need to develop adequate measures to ensure the return of such funds or assets. Some delegations were of the view that, in that connection, the question of identification of the legitimate beneficiary of funds or assets of illicit origin, as well as the question of title over those funds or assets would need to be addressed. Extensive reference was made to Economic and Social Council resolution 2001/13, which constituted a useful basis for the deliberations of the ad hoc committee on the matter.

31. Many delegations emphasized the importance of effective mechanisms for monitoring the implementation of the new convention. For some delegations those mechanisms should be regional or multilateral. According to those delegations, several existing international legal instruments provided useful sources of inspiration in that regard. Other delegations expressed concern regarding the appropriateness of regional and multilateral mechanisms, as they had a bearing on sovereignty matters, and preferred national monitoring mechanisms.

32. The Expert Group also discussed matters pertaining to the organization of the negotiation process. There was general agreement that the ad hoc

committee should elect its own bureau, which should be composed of two representatives of each of the five regional groups. There was also general agreement that the new convention should be concluded by the end of 2003. Regarding the number and duration of the sessions of the ad hoc committee, the views expressed ranged from two to six sessions of one or two weeks each per year. On the recommendation of the Chairman, the Expert Group agreed that the ad hoc committee should meet as required, holding no fewer than three sessions of two weeks each per year.

33. The Expert Group placed particular emphasis on the need for the broadest possible participation of countries in the work of the ad hoc committee. The Expert Group was therefore of the view that, following the practice of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, donor countries should be called upon to make resources available to the United Nations to cover the cost of participation of developing countries, in particular least developed countries, including local expenses.

V. Presentation on the Global Programme against Corruption

34. Representatives of the Global Programme against Corruption presented to the Expert Group a 40-minute overview of the activities of the Global Programme, as the meeting was an ideal opportunity to brief such an expert audience on the Programme and its ability to provide technical assistance to Member States. The representatives described the overall objective of the Global Programme against Corruption, its focus, integrated approach and current initiatives, and outlined some of the key lessons learned.

35. Several delegations offered comments and posed questions on the Global Programme and made positive remarks about the actions undertaken against corruption by the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention of the Secretariat. Topics included judicial corruption, accountability, reversal of the burden of proof, empowerment of victims, corporate corruption and causes of corruption. Many delegates welcomed the development of an anti-corruption tool kit and suggested that new tools should be developed to address areas such as ethics, education of youth, civil service reform and asset recovery. Other delegations stressed that there was no single model of a system to fight corruption and that the inception and implementation of appropriate measures should take into account the diversity of legal systems and traditions of States.

VI. Informal consultations

36. In agreement with the members of the Bureau, the Chairman of the Meeting decided to hold informal consultations under the Chairmanship of Ambassador Abdulkadir Bin Rimdap (Nigeria), Vice-Chairman. The Expert Group held four informal consultations. The main purpose of the consultations was to finalize a draft resolution proposed by the Chairman, entitled "Terms of reference for the negotiation of a United Nations convention against corruption". The consultations focused attention on discussing the various elements to be considered by the ad hoc committee for inclusion in the draft convention.

37. The consultations also dealt with organizational and procedural matters, including the number and duration of future sessions of the ad hoc committee and the composition of its Bureau, as well as participation of States and non-governmental organizations in those sessions. The consultations led to agreement on a consensus text, which was submitted to the Expert Group for consideration and action.

VII. Adoption of the report of the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption

38. At its fifth meeting, on 3 August 2001, the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption adopted the draft resolution contained in chapter II of the present report and decided to submit it to the General Assembly at its fifty-sixth session, through the Commission on Crime Prevention and Criminal Justice

at its reconvened tenth session and the Economic and Social Council, for adoption in accordance with General Assembly resolution 55/61.

39. The representative of the Netherlands stated that his delegation had accepted the text of operative paragraph 5 of the draft resolution on the understanding that it would not prevent the ad hoc committee established pursuant to General Assembly resolution 55/61 from being inspired by any other relevant instruments and documents addressing corruption.

40. The representative of Croatia associated himself with the statement made by the representative of the Netherlands. He also stated that his delegation understood the term "multidisciplinary approach", contained in paragraph 3 of the draft resolution, to include criminal, civil and administrative law aspects.

41. The representative of the United States stated that the divergence in the understanding of the term "multidisciplinary approach" underscored the need to take into account differences in legal systems. Her delegation understood it to signify not only criminalization measures, but also a wide range of preventive measures involved in such a complex subject matter.

42. The representative of Nigeria stated that the protection of sovereignty referred to in paragraph 3 of the draft resolution should not be understood or used in a way that would impede the efforts of countries seeking to recover illicit assets.

43. The representative of Cameroon associated himself with the statement made by the representative of Nigeria and added that domestic legislation should not function as an impediment to the efforts of countries seeking to recover illicit assets, because that would defeat the objective of strengthening international cooperation.

44. The Chairman concluded by acknowledging with gratitude the offer of the Government of Argentina to act as host of an informal preparatory meeting of the ad hoc committee prior to its first session.

45. Also at its fifth meeting, the Intergovernmental Open-Ended Expert Group adopted the report on its Meeting (A/AC.260/L.1 and Add.1/Rev.1 and Add.2).

Annex I

List of participants

States

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United States of America	Elizabeth G. Verville, Mark Richard, Kathleen W. Barmon, John Brandolino, Joseph Gangloff, Thomas Heinemann, Jay Lerner, Herbert S. Traub, Jennifer Paprotna, Andrew Chen
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Zimbabwe	T. J. Kangai, V. A. Chikanda, B. Chimhandamba

United Nations Secretariat units

Coordinating Secretariat of the High-Level International Intergovernmental Event on Financing for Development (Department of Economic and Social Affairs)

United Nations bodies and institutes of the United Nations Crime Prevention and Criminal Justice Programme network

Naif Arab Academy for Security Sciences, Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders

Specialized agencies and other organizations of the United Nations system

United Nations Development Programme, Universal Postal Union

Other intergovernmental organizations

Commonwealth Secretariat, Council of Arab Ministers of the Interior, Council of the European Union, Economic Community of West African States, European Commission, European Police Office, League of Arab States, Offshore Group of Banking Supervisors, Organization for Security and Cooperation in Europe, Sovereign Military Order of Malta, Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies

Non-governmental organizations

General consultative status

International Council of Women, Muslim World League, Soroptimist International

Special consultative status

International Council of Jewish Women, International Real Estate Federation, National Council of German Women's Organizations—Federal Union of Women's Organizations and Women's Groups of German Associations, Pax Romana (International Catholic Movement for Intellectual and Cultural Affairs and International Movement of Catholic Students)

Annex II

List of documents before the Meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption

Document symbol	*Title or description*
E/CN.15/2001/3 and Corr.1	Report of the Secretary-General on existing international legal instruments, recommendations and other documents addressing corruption
E/2001/30 and Corr.1	Report of the Commission on Crime Prevention and Criminal Justice on its tenth session
E/1996/99	Letter dated 19 July 1996 from the Permanent Representative of Venezuela to the United Nations addressed to the Secretary-General, transmitting the text of the Inter-American Convention against Corruption
A/AC.260/1 and Corr.1	Annotated provisional agenda and proposed organization of work
A/AC.260/L.1 and Add.1/Rev.1 and Add.2	Draft report

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Agenda items 96 (a) and 110

Sectoral policy questions: business and development

Crime prevention and criminal justice

Prevention of corrupt practices and illegal transfer of funds

Report of the Secretary-General*

Summary

The present report has been prepared by the United Nations Centre for International Crime Prevention of the United Nations Office for Drug Control and Crime Prevention, in response to General Assembly resolution 55/188 on preventing and combating corrupt practices and illegal transfer of funds and repatriating such funds to the countries of origin. It contains the responses provided by countries and relevant bodies of the United Nations system regarding measures adopted to implement the General Assembly resolution, as well as concrete recommendations, inter alia, with regard to the repatriation of illegally transferred funds to the countries of origin.

* The present report was submitted in September 2001, after expiration of the deadline for submission of reports to the General Assembly. The reason for the delay was that it was thought appropriate to postpone the preparation of the report until after the Intergovernmental Open-Ended Expert Group (30 July-3 August 2001), mandated by the General Assembly in resolution 55/61 to draft the terms of reference for the negotiation of the future legal instrument against corruption, and invited by the General Assembly in resolution 55/188 to examine the question of illegally transferred funds and the repatriation of such funds to the countries of origin, so as to take into consideration any relevant outcomes of the meeting. Thereafter, there was need to wait for the consideration and approval of the outcome of the Intergovernmental Open-Ended Expert Group by the Commission on Crime Prevention and Criminal Justice at its resumed tenth session, which was held in Vienna on 6 and 7 September 2001.

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Contents

		Paragraphs	Page
I.	Introduction	1–8	3
II.	Preventing and combating corrupt practices	9–88	4
	A. Measures adopted by countries	9–66	4
	B. Measures adopted by relevant entities of the United Nations system	67–72	18
	C. Tenth session of the Commission on Crime Prevention and Criminal Justice	73–83	19
	D. Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption	84–88	21
III.	Preventing and combating the transfer of funds of illicit origin and returning such funds	89–120	22
	A. Overview of the main issues involved	89–112	22
	B. Technical assistance activities of the United Nations Office for Drug Control and Crime Prevention	113–120	26
IV.	Conclusions and recommendations	121–141	27
	A. Conclusions	121–129	27
	B. Recommendations	130–141	28

I. Introduction

1. In its resolution 55/188 of 20 December 2000, entitled "Preventing and combating corrupt practices and illegal transfer of funds and repatriation of such funds to the countries of origin", the General Assembly, reiterating its condemnation of corruption, bribery, money-laundering and the illegal transfer of funds, called for further international and national measures to combat corrupt practices and bribery in international commercial transactions and for strengthened international cooperation in support of those measures.

2. While recognizing the importance of national measures, the Assembly also called for increased international cooperation, inter alia, through the United Nations system, in respect of devising ways and means of preventing and addressing illegal transfers, as well as repatriating illegally transferred funds to the countries of origin, and called upon all countries and entities concerned to cooperate in this regard.

3. In the same resolution, the General Assembly invited the open-ended intergovernmental group, mandated by it in its resolution 55/61 to draft the terms of reference for the negotiation of a new international legal instrument against corruption,[1] to examine the question of illegally transferred funds and the repatriation of such funds to the countries of origin. Finally, the Assembly requested the Secretary-General to prepare an analytical report containing information on the progress made in the implementation of resolution 55/188 and concrete recommendations, inter alia, with regard to the repatriation of illegally transferred funds to the countries of origin for submission to the General Assembly at its fifty-sixth session.

4. In July 2001, the Economic and Social Council, on the recommendation of the Commission on Crime Prevention and Criminal Justice at its tenth session, adopted resolution 2001/13, entitled "Strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and in returning such funds". In that resolution, the Council requested the United Nations Office for Drug Control and Crime Prevention to support Governments that request technical assistance in combating the transfer of funds of illicit origin and in returning such funds, and urged Governments and invited multilateral financial institutions and regional development banks, as appropriate, to support the Office in its efforts to provide that assistance.

5. In addition, the Economic and Social Council developed further the terminology used by the General Assembly in that regard. During the tenth session of the Commission on Crime Prevention and Criminal Justice, several delegations were of the view that the terminology "illegal transfer of funds" did not always address the issue in a correct way. In many cases, in fact, the transfer of funds was performed in a legal way. What was illegal was the way in which those funds had been obtained. In the light of this consideration, the Council opted for the wording "preventing and combating the transfer of funds of illicit origin, as well as on the return of such funds". That formula was also followed in the preparation of the present report.

6. The two main sections of the report cover, respectively, action against corrupt practices and the issue of preventing and combating the transfer of funds of illicit origin and returning such funds. The first section presents the measures adopted by countries and relevant entities of the United Nations system in preventing and combating corrupt practices and illustrates the outcome of the tenth session of the Commission on Crime Prevention and Criminal Justice, held in Vienna from 8 to 17 May 2001, as well as of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption, which met in Vienna from 30 July to 3 August 2001.

7. The second section includes an overview of the main problems involved in preventing and combating the transfer of funds of illicit origin and returning such funds together with a presentation of the technical assistance activities of the United Nations Office for Drug Control and Crime Prevention in this connection.

8. In the preparation of the report continuous consultations were held with the Secretariat of the United Nations Conference on Trade and Development (UNCTAD), which prepared the report of the Secretary-General on the prevention of corrupt practices and illegal transfer of funds submitted to the General Assembly at its fifty-fifth session (A/55/405). The inputs and the comments provided by UNCTAD are embodied in the text below.

II. Preventing and combating corrupt practices

A. Measures adopted by countries

9. Pursuant to resolution 55/188, the United Nations Centre for International Crime Prevention sent a note verbale to Member States seeking information on progress made in the implementation of the resolution. At the time of the preparation of the present report, substantive replies had been received from the following States: Algeria, Bahamas, Bahrain, Bosnia and Herzegovina, Brazil, Cook Islands, Estonia, France, Greece, Guyana, India, Japan, Kuwait, Malaysia, Malta, Mauritius, New Zealand, Philippines, Spain, Switzerland, Syrian Arab Republic, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Zimbabwe.[2]

Algeria

10. In Algeria, according to articles 126 and 134 of the Penal Code, acts of corruption constitute a criminal offence and are subject to sanctions; the statutory penalties are imprisonment and fines. The question of combating corruption is currently being studied by a working group of national experts, whose mandate is to reform the Penal Code, with view to bringing it into line with the provisions of the United Nations Convention against Transnational Organized Crime, signed by Algeria on 12 December 2000. With regard to combating money-laundering, the Algerian Penal Code does not contain any provisions to deal with this problem. However, it is covered under the draft bill on preventing and combating illicit traffic in drugs and psychotropic substances. The question of illegal transfer of funds and repatriation of such funds to the countries of origin is dealt with under the provisions of Order No. 22/96 of 9 July 1996 governing movements of capital.

Bahamas

11. The Government of the Bahamas has established a series of anti-money-laundering legislation and related measures.

12. The Central Bank of the Bahamas Act, 2000 allows the Bank to share, subject to certain specified conditions and controls, information with overseas regulatory authorities, in order to enable them to exercise their regulatory functions. It also expands the circumstances in which disclosure of bank information can occur without breach of the confidentiality provision.

13. The Banks and Trust Companies Regulation Act, 2000 ensures that adequate measures for due diligence are carried out on every applicant seeking a bank or trust company licence. It extends the circumstances for permissible disclosure of bank information and sharing of information with local domestic regulators. The Act also provides for on-site inspections and for cross-border consolidated supervision.

14. The Financial and Corporate Service Providers Act, 2000 provides for the licensing of financial and corporate service providers and for their compliance with the Financial Transactions Reporting Act.

15. The Financial Transactions Reporting Act, 2000 calls for mandatory "know your customer" rules, including the obligation to maintain records for a period of five years and to report suspicious transactions activity.

16. The International Business Companies Act, 2000 removes the element of ring-fencing and the provisions are now consistent with the requirements of the Companies Act. An international business company can only be incorporated by a registered agent under the Financial and Corporate Service Providers Act or a licensed bank or trust company, and must always maintain a registered agent or bank or trust company licensee. The exchange control applies to the extent that such business is carried on with Bahamians.

17. The Proceeds of Crime Act, 2000 gives the police new powers of seizure and confiscation and allows for the sharing of confiscated assets between jurisdictions. The Act further provides for reporting of suspicious activity where such comes to the knowledge of a person during the course of his business or trade. It also allows for monitoring orders in relation to accounts.

18. The Dangerous Drugs Act, 2000 makes new provisions for the forfeiture of personal property used in the course of committing an offence under the Act. The Financial Intelligence Unit Act, 2000 establishes a separate entity which allows for effective exchange of information, through administrative means, for the purpose of money-laundering investigations. It also

ensures that all financial institutions put in place procedures for identifying high-risk accounts and provide annual training for all employees in the detection techniques. The Unit has the power to compel the production of information and to exchange information pursuant to a request from overseas.

19. The Criminal Justice (International Cooperation) Act, 2000 and the Evidence (Proceedings in Other Jurisdictions) Act, 2000 permit the sharing of information pursuant to a criminal matter or civil matter, even under investigation by means of application to the Attorney General or Registrar of the Supreme Court respectively.

20. The Compliance Commission is a new and innovative creation responsible for regulating those financial institutions not otherwise regulated in relation to enforcement of the provisions of the Financial Transactions Reporting Act. Examples in this category include lawyers, accountants, real estate brokers, persons in the business of financial leasing and persons who are in the business of managing money on behalf of others.

Bahrain

21. Bahrain has decree law number (4) of 2001 containing provisions governing the prevention and prohibition of the laundering of money. Under article 2 of the law, which covers the offence of money-laundering, as well as offences related to the offence of money-laundering, any person who commits any of the following acts for the purpose of showing that the source of the property is lawful shall have committed the offence of money-laundering: (a) conducting of a transaction with the proceeds of crime; (b) the concealment or disguising of the nature, source, location, disposition, movement, rights with respect of, in or over, or ownership of the proceeds of crime; (c) the acquisition or receipt or transfer of the proceeds of crime; and (d) the retention or possession of the proceeds of crime. The person who commits any of the above acts must know or believe or have reason to know that such proceeds of crime are derived from criminal activity or from an act of participation in criminal activity. The following acts constitute an offence related to money-laundering: (a) failure to disclose to the Enforcement Unit any information or suspicion acquired in the course of that person's trade, business, profession, employment or otherwise regarding the offence of money-laundering; (b) failure or refusal to follow or obstruction or hindering of any order issued by the Enforcement Unit or issued at its request by the Investigation Magistrate pursuant to investigation of the offence of money-laundering; and (c) disclosure of any information or suspicion acquired in the course of that person's trade, business, profession, employment or otherwise regarding the issue of an investigation order or attachment order in a money-laundering offence, where such disclosure is likely to prejudice the investigation. Article 3 of the decree deals with the issue of punishments and states that any person committing, attempting or participating in a money-laundering offence shall be liable to imprisonment for a period not exceeding seven years and a fine not exceeding one million Bahrain dinars.

22. Article 4 of the decree describes the tasks of the Policy Committee for the prevention and prohibition of money-laundering. The Committee shall, in particular, exercise the following powers: (a) formulate policies and procedures to regulate the business of the Committee; (b) establish general policies with regard to the prevention and prohibition of money-laundering; (c) in coordination with the relevant entities, issue guidelines on the reporting of suspicious transactions; (d) study regional and international developments in the field of money-laundering for the purpose of recommending updates to the guidelines and changes to the Law when necessary; and (e) coordinate with the relevant entities for the implementation of the United Nations Convention and the Arab Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Minister of the Interior shall appoint the above-mentioned Enforcement Unit, which shall have the following powers: (a) receipt of reports on money-laundering offences and related offences; (b) conducting investigations and compiling evidence in money-laundering offences and related offences; (c) implementing procedures relating to international cooperation under the provisions of this Law; and (d) execution of decisions, orders and decrees issued by the competent courts in offences related to money-laundering. Under Article 6, the Enforcement Unit, where it has evidence that a person has committed or attempted or participated in committing a money-laundering offence, may obtain an order issued by the Investigation Magistrate authorizing any of the following actions: (a) requiring the accused or any other natural or corporate person to deliver up any documents or records or papers or to provide any information which is requisite for the investigation;

(b) entry into public or private premises for the attachment of any documents, records, papers or objects which are requisite for the investigation; (c) attachment and freezing of any property which is subject to confiscation in accordance with the provisions of this Law; and (d) prohibition of the transfer of such property.

23. Article 7 of the decree addresses the issue of secrecy of accounts and records and states that, on the coming into force of the provisions of this Law, no institution can plead before the Investigation Magistrate or the competent Court, secrecy or confidentiality in respect of accounts, identification of customers or record keeping provided under the provisions of any Law. Article 8 lays down the rules for request of assistance from foreign States for specific information relating to suspicious transactions, persons and corporations involved in those transactions or the investigation or prosecution of a money-laundering offence. According to Article 9, the Enforcement Unit and the relevant entities in the State of Bahrain may exchange information of a general nature regarding the offence of money-laundering with competent authorities in foreign States. The Enforcement Unit shall in response to a reasonable request from a competent authority in a foreign State provide to that competent authority specific information relating to suspicious transactions or persons and corporations involved in those transactions or the investigation or prosecution of a money-laundering offence. Article 11 of the decree foresees that the offence of money-laundering shall be deemed to be one of the extraditable offences in accordance with the applicable Laws and the international treaties ratified by the State of Bahrain and the principle of reciprocity.

Bosnia and Herzegovina

24. Bosnia and Herzegovina and its two entities (the Federation of Bosnia and Herzegovina and the Republika Srpska), under the leadership of the Office of the High Representative, have undertaken, over the past three years, a number of key measures to curb corruption, focusing first on improving the legal framework. This reform includes new Criminal Codes for both the Federation of Bosnia and Herzegovina and the Republika Srpska, adopted in 1998 and 2000, respectively, a new Criminal Procedure Code for the Federation of Bosnia and Herzegovina (adopted in 1998) and a money-laundering legislation (adopted in 2000) for the Federation of Bosnia and Herzegovina. Parallel to this legislative effort, the Office of the High Representative has led the efforts to develop more coherent institutions directed at both preventing and sanctioning corruption. Thus, in cooperation with the entity prosecutors, the Office has developed the concept of anti-corruption task forces composed jointly of prosecutors and police officers. Public management measures aimed at promoting and upholding the integrity of public officials are being developed as well. For instance, some important steps have been undertaken to establish a system of government hiring of officials, including in the judiciary, that would assure more efficiency and would promote hiring of more competent individuals. The two entities have also started to adopt laws, management practices and auditing procedures with the aim to ease the detection of corrupt activity.

25. The Office of the High Representative also promoted the development of national coordination mechanisms. In 1998, it created an Anti-Fraud Unit, which has been dealing with corruption and money-laundering offences on an individual case level, as well as on a systematic level. It developed an Anti-Corruption Strategy for Bosnia and Herzegovina in 1999 and has been cooperating with other international organizations, including the Council of Europe, the Organization for Security and Cooperation in Europe and the United Nations, and non-governmental organizations, such as Transparency International, in assistance and training programmes relating to the fight against corruption. The Office of the High Representative also created an Anti-Corruption Coordination Group composed of senior representatives of all organizations involved in anti-corruption efforts in the country. This group meets regularly to exchange information and develop joint strategies.

26. Articles 358 to 371 of the Federation Criminal Code deal with offences against official duty or other responsible duty. In the new Republika Srpska Criminal Code, there are 14 articles in total dealing with corruption offences. The Criminal Codes of both entities of Bosnia and Herzegovina make active and passive bribery of domestic public officials, as well as in the private sector, a criminal offence. In Bosnia and Herzegovina, the fight against illicit payments in business transactions is within the competence of the

entities. Bribing a public official with a view to obtaining or retaining business or other improper advantage is a criminal offence in both the Federation of Bosnia and Herzegovina and the Republika Srpska. The offence is defined as the act of offering, promising or giving intentionally a gift or any other benefit to an official, so that the official performs or does not perform an act within the scope of his/her official duties. The attempt to, complicity (participation) in and incitement to bribe also constitute criminal offences and they include authorization. The officials who may not be bribed are broadly defined to include, in both entities, any person who holds, at all levels and subdivisions of government and administration within the territory of the entity and the State of Bosnia and Herzegovina, a legislative, administrative or judicial office. The prohibition also applies to any person who continuously or occasionally exercises official duties, including in a company or another legal person, such as institutions, financial bodies, funds and other public agencies.

27. Although the revised Republika Srpska Criminal Code adopted in June 2000 contains a provision on money-laundering, its scope of application remains unclear, since no implementing agency has been specified. The Federation of Bosnia and Herzegovina enacted money-laundering prevention legislation in March 2000. The law only provides for reporting and coordination requirements and establishes a set of civil and administrative penalties. It does not make money-laundering a criminal offence and does not permit the seizure and confiscation of criminally derived assets. Temporary seizure (art. 200 of the Federation of Bosnia and Herzegovina Criminal Procedure Code) and the confiscation of instrumentalities or proceeds from crime are, however, possible under existing criminal legislation in the entities (art. 68 and 110-113 of the Federation of Bosnia and Herzegovina Criminal Code, art. 482-292 of the Federation of Bosnia and Herzegovina Criminal Procedure Code).

28. Finally, Bosnia and Herzegovina is a signatory of the Council of Europe's Criminal and Civil Law Conventions on Corruption and of the United Nations Convention against Transnational Organized Crime, signed in March and December 2000, respectively.

Brazil

29. The Brazilian Government has intensified actions to combat corrupt practices and the illegal transfer of funds with the promulgation, on 13 March 1998, of Law number 9.613, which criminalizes corruption as a prior offence to the crime of money-laundering. Rules were enacted, in accordance with the aforementioned Law, covering all sectors of the economy, by which the identification of clients, the registry of all transactions above a specified limit and the communication of suspicious operations have become mandatory. As regards the return of funds of illicit origin, the same Law establishes that, even in the absence of relevant treaties or international conventions, the Brazilian judicial system shall determine the seizure or freezing of any goods, assets or funds derived from the crime of corruption and money-laundering, as long as the Government of the requesting authority's country assures reciprocity. In addition, the Law created the Council for the Control of Financial Activities (*"Conselho de Controle de Atividades Financeiras"*) as a central national agency, according to the Financial Intelligence Unit model, with the function of receiving, analysing and forwarding to the competent authorities complaints related to the above-mentioned crimes.

Cook Islands

30. The Cook Islands Money Laundering Prevention Act was enacted on 18 August 2000. The purpose of the legislation is to construct barriers to the potential use of the Cook Islands as a method of introducing illicit funds to the financial system. The salient features of the Act include criminalizing money-laundering and placing an obligation on financial institutions to keep a business transaction record of every new account, every new business transaction exceeding US$ 30,000 and the beneficial owner or the principal beneficial owner of every account opened for a period of five years. Section 8 of the Act establishes the Money Laundering Authority, which comprises the Financial Secretary, the Commissioner for Offshore Financial Services and the Commissioner of Police. The powers and the duties of the Authority include: (a) receiving reports issued by financial institutions; (b) sending any such report to the Solicitor General for Prosecution; (c) instructing any financial institution to take such steps as may be appropriate; (d) compiling statistics and records; (e) making recommendations arising out of any information received; (f) issuing guidelines to financial institutions; (g) advising the Minister of Finance and Solicitor General with regard to any matter relating to money-laundering; and (h) creating training requirements and providing such training for

any financial institution in respect of the business transaction record keeping and reporting obligations as provided. In addition, the Act makes provision for cooperation by the Money Laundering Authority with a foreign State and by the Cook Islands to a foreign State. In May 2001, the Cook Islands joined the Asia-Pacific Group on Money Laundering as part of its overall strategy to combat money-laundering. The membership of the Group requires adherence to the 40 recommendations of the Financial Action Task Force on Money Laundering.

Estonia

31. Estonia has signed and ratified several international conventions. The Act ratifying the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime was adopted on 8 March 2000. The Parliament adopted the Accession Act on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 on 31 May 2000. The Council of Europe Civil Law Convention on Corruption (ETS 174) was ratified by the Estonian Parliament on 18 October 2000. The Money Laundering Prevention Act of 1 July 1999, amended in autumn 2000, states explicitly the obligation of credit and financial institutions to identify all persons for whom an account is opened, and representatives of such persons. The basic legal act for combating corruption in Estonia is the Anti-corruption Act which, together with the Public Service Act, the Public Procurement Act, the State Assets Act and the Criminal Code, forms a framework to understand corruption and provides procedural rules. The Ministry of Internal Affairs has been designated as the ministry leading the prevention of money-laundering. On 18 May 2000, an inter-institutional committee was established, under the responsibility of the Ministry of Internal Affairs, to assess regularly anti-money-laundering measures and coordinate activities in this field. The role of this committee is primarily seen in providing common approach to anti-money-laundering activities.

32. In order to create an effective system to prevent money-laundering in Estonia, the Financial Intelligence Unit was established, on 1 July 1999, within the Crime Department of the Police Board. Main tasks of the Financial Intelligence Unit are: (a) to collect, register, process and analyse received information; (b) to forward important information concerning probable money-laundering or criminal offence(s) related to pre-trial investigation authorities, judges and prosecutors; (c) to inform persons who submit information to the Unit of the use of the information in the prevention, establishment or investigation of money-laundering and criminal offences related thereto; (d) to cooperate with credit and financial institutions, undertakings and police authorities in the prevention of money-laundering; (e) to analyse and conduct researches on the money-laundering situation in Estonia; and (f) to organize foreign relations and the exchange of information with Financial Intelligence Units of other countries. The Unit has the right to suspend a transaction or impose restrictions on the use of money in an account for up to two working days as of the first attempt to carry out the transaction. The Financial Intelligence Unit also has the right to turn to court to apply for the seizure of the property if the need arises to ensure the preservation of property which is the object of money-laundering. An amendment made to Taxation Act, section 11, which entered into force on 17 November 2000, provides the right for the Unit to ask and receive information from the tax and customs authorities. As a result, the Unit receives regular reports from the customs authorities regarding suspicious cash movement on the border.

France

33. Under French criminal law it was an offence, until June 2000, for persons in France exercising public authority or holding public or elected office to engage in bribery or to accept bribes (art. 433-1 and 432-AA of the Criminal Code). In a separate provision, the Code also covered bribery of magistrates, jurors, arbitrators, experts or any person invested by the judicial authorities with the task of conciliation or mediation (art. 434-9), and their acceptance of bribes, as well as corruption of a witness. In general, French law provides for the confiscation of the funds derived from corruption in the form of instrumentalities or proceeds from the offence. Confiscation may be ordered in an equivalent monetary amount when the confiscated item has not been seized or cannot be physically presented. With regard to corruption, article 433-23 of the Criminal Code provides explicitly, as a supplementary penalty, for confiscation "of sums or property received illicitly by the offender, with the exception of property subject to restitution" (i.e. belonging to third parties in good faith). At the procedural level, prior to the execution of a

confiscation order, the proceeds from the offence, including those from corruption, may be seized, the scope for which is very broad, covering all property that needs to be obtained in order to discover the truth. This measure may be taken either during an inquiry conducted in France or in response to a request by a foreign State for judicial cooperation from France. Property seized in this way is not transferred to the State but is provisionally administered by the court. It may, in accordance with the conditions and procedures provided for by law, be subject to restitution or confiscation.

34. French law prescribes special procedures for acting on requests for assistance regarding seizure or confiscation, when such requests are made on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 (Law of 14 November 1990) or the Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (Law of 13 May 1996). In principle, confiscated property is transferred to the French State (without prejudice to the legitimate rights in rem of third parties, whether the decision to confiscate comes from a French or a foreign court). However, article 14, paragraph 2, of the aforementioned Law of 13 May 1996, implementing the Convention of the Council of Europe of 8 November 1990, authorizes the conclusion of an agreement with the State requesting enforcement of a confiscation order, in order to transfer ownership of the confiscated property to such State.

35. Law No. 2000-595 of 30 June 2000, amending the Criminal Code and Code of Criminal Procedure in matters of corruption control, which entered into force on 29 September 2000, establishes new offences under French law to punish acts of: (a) bribery of foreign public officials in international commercial transactions; and (b) bribery of European Community officials, national officials of another member State of the European Union or members of European Community institutions, or the acceptance of bribes by such officials. This law, which supplements criminal legislation by providing for the punishment of corruption by foreign public officials or international officials, was adopted to allow a number of international instruments to be embodied in French law (the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of the member States of the European Union of 26 May 1997, and the Convention of the Organisation for Economic Cooperation and Development on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997). Law No. 2001-420 of 15 May 2001 on new economic regulations strengthened the criminal law provisions on laundering by making it a criminal offence for individuals associated with one or more persons engaged in laundering not to be able to account for the means enabling them to maintain their lifestyle. It also introduced, in the case of laundering, the penalty of confiscation of all or part of the assets of the offender upon conviction. These provisions also apply to the laundering of proceeds from corruption.

Greece

36. In Greece, the provisions of the Penal Code on active and passive bribery (art. 235 and 236) have been amended in 2000 so as to become more effective. Greece has ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development (Law No. 2656/1998), the European Union Conventions on the fight against Corruption involving officials of the European Communities or officials of Member States of the European Union (Law No. 2802/2000) and on the Protection of the European Communities' financial interests and its Protocols (Law No. 2803/2000). In addition, the Criminal Law and the Civil Law Conventions on Corruption of the Council of Europe have been signed in 1999 and 2000, respectively.

Guyana

37. Guyana has not yet taken special legislative measures against the illegal transfer of funds and repatriation of such funds to the country of origin. However, under the Criminal Laws (Offences) Act, Chapter 8:01, provisions are made against: (a) public servants taking gratification other than legal remuneration in respect of an official act; (b) taking a gratification in order, by corrupt or illegal means, to influence a public servant; (c) taking a gratification for the exercise of personal influence with a public servant; and (d) commission of any of the above offences by an agent. The Money Laundering Act 2000 could, in certain circumstances, be applied to redress corrupt practices and illegal transfer of funds.

According to section 19 of the Act, property, proceeds and instrumentality derived from the commission of money-laundering offences in or out of Guyana can be frozen by a court. Section 20 provides for the forfeiture of property derived from proceeds of money-laundering offences. The Money Laundering Act also provides for international cooperation between the Court and the Competent Authority of Guyana for the purpose of the Act and the Court and Competent Authority of another State to identify, trace, freeze, seize or forfeit the property, proceeds or instrumentalities derived from or related to money-laundering. When such property is forfeited, it may be disposed of in such a manner as the Minister may direct. Section 20 (1) may provide for the Minister to order the repatriation of property forfeited to bona fide third parties. The Integrity Commission Act of 1999 requires public officials at the levels of, inter alia, the executive, legislative, justice system and heads of government departments to declare their assets and income annually, so that increases in their wealth could be compared with their legal earnings. The legislation does not distinguish between gifts, remuneration or benefits that are acceptable, and those whose solicitation or acceptance may be considered an act of corruption. The legislation has set no limit as to the value of a gift a public official may accept in the exercise of his public function.

India

38. India has very strong and comprehensive institutional mechanisms for combating corruption, which include a strong legislative framework and independent judiciary. A powerful statutory authority designated as Central Vigilance Commissioner has been created. The Prevention of Corruption Act, enacted in 1988, covers all categories of public servants, including members of parliament. It criminalizes not only taking or giving of illegal gratification, but also criminal misconduct, that is, procuring or obtaining for someone any unfair advantage or benefit. Abetment of corruption is also criminalized in the legislation. The Act provides for the setting up of special courts to ensure expeditious trial of the cases made out under this Act.

39. Furthermore, the Indian Government is committed to having a consolidated legislation for the prevention of money-laundering. A Bill to criminalize attempts at money-laundering is under consideration by the Government. The Prevention of Money-laundering Bill envisages that any dealing or laundering of money or property arising from the commission of certain scheduled offences will be an offence punishable under the proposed statute. The term "scheduled offence" includes certain offences under the Prevention of Corruption Act, 1988. Therefore, in India, proceeds of crime arising from corruption or bribery will be covered within the purview of the proposed Money-laundering Bill. The 40 recommendations of the Financial Action Task Force on Money Laundering were kept in view while drafting the Prevention of Money-laundering Bill. India, as a member of the Asia-Pacific Group on Money Laundering, accepts those 40 recommendations. To enable repatriation of illegally transferred funds to the country of origin, chapter IX of the proposed Bill, entitled "Reciprocal arrangement for assistance in certain matters and procedures for attachment and confiscation of property", provides for agreements with foreign countries and also reciprocal arrangements for transfer of accused persons and attachments, seizure and confiscation of property in both the contracting State and India. Thus the proposed legislation contains legal provisions to enable repatriation of illegally transferred funds to the countries of origin.

Japan

40. In Japan, when the Government receives a request for assistance from a foreign country, it decides whether the case falls into the category of a criminal or a civil case. In civil cases, foreign Governments and foreigners can be parties to a lawsuit in Japan and can therefore bring civil actions to regain illegally transferred funds. In criminal cases, there is no independent or specific procedure which designates the return of illegally transferred funds to foreign countries. However, the Law for International Assistance in Investigation allows the law enforcement authority to request the possessor of an article of evidence necessary for the investigation of the case in question of the requesting country to voluntarily submit the article (tangible articles only), or may seize such an article of evidence with a warrant and to transfer it to the requesting country. In certain cases, illegally transferred funds could be the subject of these procedures. According to the Code of Criminal Procedure, the investigation authority may also seize articles of evidence or confiscable assets (tangible articles only). When the retention of these articles and

assets become no longer necessary, they are restored, in principle, to the possessor. However, illegally obtained articles are restored to the victims where there are obvious reasons to do so. In addition, seized articles may be restored to the entitled person, for example, the rightful owner, when the possessor waives his or her right to claim restoration. In these cases, articles can be restored to the entitled person even if he or she lives abroad.

Kuwait

41. In Kuwait, the Central Bank took several measures in its continuous follow-up of the latest developments at the international level concerning the combating of money-laundering and suspicious transactions. A technical and legal study was carried out of the 40 recommendations of the Financial Action Task Force on Money Laundering. Pursuant to that study, the Central Bank issued, in 1993, regulatory instructions to all the units under its control to combat money-laundering. In December 1993, all banks and foreign exchange companies were advised that they should take sufficient care in examining transfers received from their clients, especially if such transfers were of large sums of money and of unclear aims, or raised doubt about their nature or purposes. Banks were also requested to ascertain that electronic transfers contain information on the transferring and beneficiary parties. All units under the control of the Central Bank were required to notify the Bank of all cash purchases and deposits in the amount of or exceeding 10,000 Kuwaiti dinars, or their equivalent. In addition, private banks were requested to achieve full and effective coordination among themselves in dealing with the messages received from abroad and containing suspicious offers. In 1996, the Financial Action Task Force on Money Laundering introduced certain amendments to the 40 recommendations. The units under the Bank's control were provided with a detailed manual on the patterns of money-laundering operations for their guidance and for the training of employees of the banks and companies.

42. In 1998, a ministerial decision was issued in Kuwait to establish a Committee consisting of members from the following government authorities: the Ministry of the Interior, the Ministry of Justice, the Ministry of Trade and Industry, the Ministry of Finance and the Directorate-General of Customs, as well as the Central Bank. The Committee's duties were to collect, study and analyse all the information and statements connected to money-laundering operations, submit the necessary proposals with regard to them and participate in developing the necessary legislations. The Committee was also charged with answering and coordinating all messages received by the State of Kuwait from external quarters in connection with money-laundering operations in order to achieve concerted and unified governmental efforts in combating money-laundering. The Committee has finished preparing a draft law to criminalize money-laundering, which was submitted to the Council of Ministers for submission to Parliament for approval. On 12 June 2000, the State of Kuwait ratified the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Accordingly, the articles of that Convention and the contents thereof relating to money-laundering are considered an enforceable law as from the date of its ratification.

Malaysia

43. Malaysia has various measures in place to combat corrupt practices. For instance, Malaysia established, in 1997, the Anti-Corruption Agency, whose task, inter alia, is to combat corrupt practices, including enforcing the 1997 Anti-Corruption Act, which contains the following important elements: (a) the Act makes it an offence for a person to deal with, use, hold, receive or conceal gratification; (b) the Act is applicable to citizens and permanent residents of Malaysia, regardless of whether the offence is committed outside or within the country;[3] and (c) the Act empowers the Anti-Corruption Agency to seize and forfeit property used in the commission of offences under the Act. The Malaysian Anti-Money Laundering Act 2001 empowers the Anti-Corruption Agency to prevent and detect the laundering of proceeds of corruption and bribery. The Act facilitates international cooperation on this matter by providing the sharing of information and clarifying the limits on secrecy provisions. The Act criminalizes money-laundering, imposing obligations of customer identification, record keeping and the reporting of suspicious transactions by institutions. The Act permits the seizing, freezing and forfeiture of properties that are proceeds of money-laundering. Moreover, the Act covers 119 serious offences, including corruption. Malaysia has exchange control laws and regulations that require the reporting of payments exceeding the equivalent of RM 10,000 to a

non-resident for any purpose other than payment for investment abroad or payment under guarantee for non-trade purposes. Any other payment abroad requires specific permission of the Controller of Foreign Currency. Furthermore, the Act criminalizes money-laundering, bribery and corruption, which are listed as money-laundering predicate offences.

44. In addition, Malaysia has introduced a number of anti-money-laundering measures set out below that have the effect of preventing illegal transfers of funds:

(a) *Guidelines on money-laundering and "know your customer" policy.* Bank Negara Malaysia (Central Bank) on 27 December 1993 issued Guidelines (BNM/GP 9) to ensure compliance with the laws against money-laundering through customer identification and verification, financial record keeping and mandatory reporting of suspicious activity;

(b) *Minimum guidelines on the provision of internet banking services.* Bank Negara Malaysia also issued the Minimum Guidelines in May 2000 requiring banking institutions to have face-to-face interaction with customers prior to the opening of accounts or the extension of credit and to ensure that customer identification procedures are also followed in the provision of internet banking;

(c) *Guidelines on anti-money-laundering measures to the insurance industry.* The above-mentioned Guidelines were issued to the insurance industry on 25 April 2001. Their purpose is to provide a framework to guide the insurance industry to put in place effective anti-money-laundering measures, including the need to be vigilant and to verify the identity of their customers, keep records, recognize and report suspicious transaction or customers, as well as provide training of key personnel;

(d) *Anti-money-laundering provisions in various laws.* The following legislation already incorporates anti-money-laundering provisions: sections 3 and 4 of the 1988 Dangerous Drug (Forfeiture of Property) Act make it an offence for a person to deal with, or using, holding, receiving or concealing any property derived from activities relating to drug trafficking. Section 53 of the 1996 Labuan Offshore Trust Act 1996 prohibits a trust company, among others, from accepting money derived from a criminal offence under the laws of Malaysia.

45. Malaysia became a member of the Asia-Pacific Group on Money Laundering on 31 May 2000.

Malta

46. Malta informed the Secretariat that there are no legal instruments available in Malta enabling the repatriation of illegal funds to the country of origin.

Mauritius

47. In Mauritius, the Economic Crime Office came into operation on 7 July 2000 with the adoption of the Economic Crime and Anti-Money Laundering Act. The Office which is a law enforcement and a financial intelligence body has powers to investigate all economic crimes, including corruption, and the laundering of the proceeds of such crimes. The Economic Crime and Anti-Money Laundering Act provides for mutual assistance and international cooperation in the field of investigation as well as for the restraint and forfeiture of proceeds of economic crime.

New Zealand

48. In New Zealand, the Crimes Act of 1961 is the main statute on criminal law, which contains a number of offences relating to the bribery or corruption of officials. There are separate offences dealing with the bribery or corruption of judges, judicial officials, the executive, members of parliament, and law enforcement officers. In addition, the Act includes several more general offences that apply to other officials (defined, in this context, as those working in central or local government, regardless whether or not that work is honorary). However, bribery within the private sector is caught only in cases where the Secret Commissions Act 1910 applies. That Act contains a number of offences that prohibit conduct involving secret commissions (where an agent makes or receives a gift or other payment as inducement or reward for doing or not doing any act in relation to the principal's affairs or business).

49. In May 2001, the New Zealand Parliament passed legislation that implements obligations in the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development. The legislation, which amends the Crimes Act, creates a new offence of bribery of foreign

public officials that carries a maximum penalty of seven years imprisonment. As a result of the enactment of this legislation it is an offence not only to bribe foreign public officials in New Zealand but also for New Zealand nationals, residents and corporate bodies registered in New Zealand, to do so elsewhere. The new legislation also links into domestic laws relating to money-laundering and the proceeds of crime, and provides for extradition and international assistance in criminal investigations and proceedings involving this sort of conduct. There are two money-laundering offences in New Zealand law. Section 257 A of the Crimes Act 1961 is the general offence of money-laundering. Section 12 B of the Misuse of Drugs Act 1975 relates specifically to the laundering proceeds of drug offences. The two offences criminalize both engaging in money-laundering transactions and possession of the proceeds of crime with intent to engage in such a transaction.

50. New Zealand is a member of the Financial Action Task Force on Money Laundering. Amongst the measures taken to implement the Task Force's 40 recommendations was the enactment of the Financial Transactions Reporting Act 1996, which requires financial institutions to report suspicious transactions and also the reporting of the import and export of cash over a certain value. This Act has resulted in much greater monitoring of the transfer of funds than was previously possible. The Proceeds of Crime Act 1991 provides for the forfeiture of the proceeds of serious crime that occurs in New Zealand. It also contains the provisions that are needed to give effect to requests from other countries for assistance with the freezing and confiscation of the proceeds of crime that occurs outside New Zealand. Where funds are confiscated under the Proceeds of Crime Act 1991 at the request of another country, the Attorney-General can direct that those funds be repatriated in full or in part. Generally this matter is raised, and resolved by agreement, at the time that a request is received. If it is not possible to prove that the funds are the proceeds of a particular crime, it is necessary to use civil law processes or remedies to prove ownership before the funds can be repatriated.

51. The Extradition Act 1999 permits extradition for offences that carry a maximum penalty of at least one year's imprisonment in both New Zealand and the requesting country. It is not necessary to have an extradition treaty with the requesting country, as the Act allows requests to be dealt with on a case-by-case basis. However, if there is no existing extradition relationship with the requesting country, some information will be required about the extent to which that country could give effect to a New Zealand extradition request made in similar circumstances. The Mutual Assistance in Criminal Matters Act 1992 deals with other forms of international cooperation in criminal investigations and proceedings, such as taking evidence and obtaining search warrants. Some limits apply in relation to particular forms of assistance. For instance, orders relating to the proceeds of crime must involve offences that carry a maximum penalty of five years' imprisonment in the requesting country. Requests can be dealt with on a case-by-case basis without a treaty, although again, New Zealand would generally wish to receive some assurance of reciprocity in similar circumstances.

Philippines

52. The Government of the Philippines has forwarded an extensive analytical report on the difficulties encountered in recovering the Marcos assets. In 1986, a formal request for judicial assistance was filed in Switzerland under the Federal Act on International Mutual Assistance in Criminal Matters (IMAC). In 1989, a Swiss magistrate declared that "the assets may be turned over only when it is sufficiently established that they were acquired directly or indirectly through offence, justifying the penal prosecution abroad or at least that their punishable origin is highly probable". The Magistrate concluded that the Philippine request was not sufficiently precise for immediate action on the request for transfer of funds. However, the 1986 filing of the request for judicial assistance extended a provisional freeze order previously issued by the Swiss authorities blocking all assets of the Marcos family held in Switzerland. In December 1990, the Swiss Federal Court ordered the transmission only of the banking documents to the Presidential Commission on Good Governance and ruled that the assets would only be remitted to the Republic of the Philippines upon fulfilment of a number of conditions, namely: (a) that there be final conviction rendered against Mrs. Marcos before Philippine courts in the case of violation of R.A. 1379 (the law of forfeiture of ill-gotten wealth); (b) that she be accorded due process of law in the judicial proceedings; and (c) that her rights under the Swiss Federal Constitution and under the European Convention on Human Rights and Fundamental

Freedoms be safeguarded in accordance with IMAC. In December 1991, the Presidential Commission on Good Governance filed a Civil Case in a Philippine court seeking to recover the properties and assets in the names of the foundations organized by the Marcoses to conceal their secret deposits in the Swiss banks.

53. In August 1995, the Presidential Commission on Good Governance filed a Petition for Additional Request for Mutual Assistance before the Office of the District Attorney of Zurich, seeking a modification of the Federal Supreme Court judgement of December 1990 in order that the assets may be transferred even before the rendering of a final and enforceable judgement in the Philippines. The petition invoked, among others, the exceptions provided for under article 74 of IMAC which allows, in some highly exceptional cases, the transfer of the assets at any time at the discretion of the authorities. The Presidential Commission also submitted and discussed a number of incidents and actions in the Philippine courts which corroborated the allegations that the assets located in Switzerland are a product of corruption and belong rightfully to the Republic. Finally, with a view to securing the assets and the rights of the potentially entitled parties, the Presidential Commission offered the sovereign facilities of the Republic that the assets be held under an escrow account in the name of the respective foundations, to keep and reinvest the assets in the form of investment and currency as received, and not to dispose of the assets other than in accordance with an enforceable judgement of the competent Philippine court or in accordance with the instructions of the Presidential Commission and either the foundations concerned or the estate and other legally entitled parties. In August 1995, the Magistrate of the Canton of Zurich issued an unprecedented order partially modifying the December 1990 judgement and ordering the immediate transfer of the assets beneficially owned by the Marcoses to the Republic. On appeal by the Marcoses, their estate and foundations, and the Swiss banks, the Zurich Superior Court of Appeals quashed the order on the ground that the new petition was barred by the Swiss Supreme Court decision of December 1990, which requires a judgement of final conviction for the forfeiture of the funds. In December 1997, the Swiss Federal Authorities sustained the position of the Philippine Government that the money can be moved out of Switzerland even without a judgement of final conviction against Mrs. Marcos, pursuant to the exception under article 74 of IMAC. In early 1998, the Marcos funds were repatriated to the Republic of the Philippines.

Spain

54. Spain has introduced offences of corruption in international commercial transactions in article 445 of its Criminal Code. In addition, Spain supports the elaboration of mechanisms and instruments to strengthen international cooperation in that regard. With respect to efforts to combat illegal transfers of funds, in addition to those efforts already undertaken by the Council of Europe and the Financial Action Task Force on Money Laundering, the Spanish authorities have indicated the desirability of tackling this problem at a global level, in order to ensure that no geographical region is able to remain on the sidelines of the problem, enjoying total immunity.

Switzerland

55. Switzerland informed the Secretariat of the series of measures undertaken, both at the national and international levels, to combat corruption. At the national level, the amendments to the criminal law provisions on corruption came into force on 1 May 2000. Criminal law prescribes the same sanctions for passive bribery as those that apply to active bribery, namely, deprivation of liberty. In the process of implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development (OECD), its scope was also extended to cover bribery of foreign public officials. In addition, guidelines on combating corruption were adopted by the Directorate for Development and Cooperation of the Department of Foreign Affairs (1998). At the international level, Switzerland ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in May 2000. In 1996, the Directorate for Development and Cooperation followed one of the recommendations that OECD had adopted that same year, by passing an Anti-Corruption clause in the area of development cooperation. In February 2001, Switzerland signed the Council of Europe Criminal Law Convention on Corruption.

56. As far as the fight against money-laundering is concerned, Switzerland has undertaken a series of

national and international measures. In order to combat misuse of the Swiss financial centre for the purpose of money-laundering, several amendments to the Swiss Penal Code that came into force in 1990 outlaw money-laundering. Money-laundering is defined as an act intended to obstruct the identification, detection and confiscation of assets earned by criminal means. Money-laundering is punishable regardless of where the main offence is committed. The Swiss Penal Code also punishes the failure to exercise due diligence in conducting financial dealings, in particular, the failure to identify the beneficial owner. The Federal Act on Money Laundering came into force on 1 April 1998. It is uniformly applied to all financial intermediaries, that is to say, all persons who in the course of their professions accept, hold in deposit or assist in the investment or transfer of assets belonging to others. In this way, both the banking and non-banking sectors are covered by the legislation. The Act obliges all financial intermediaries who know or have a justified suspicion that money-laundering is involved in a business relationship to report to the Money Laundering Reporting Office.

57. The Banking Law established an independent banking supervisory authority known as the Swiss Federal Banking Commission. It is empowered to authorize an applicant to engage in banking activity if the conditions for granting a licence are met. One of the conditions is that the applicant must be able to guarantee that their conduct is beyond reproach. The Commission may check whether a bank meets these conditions at any time and may withdraw its licence should this not be the case. The Control Authority instituted by the Federal Act on Money Laundering is charged with supervising financial intermediaries in the para-banking sector, with the exception of those already subject to special supervision. The Control Authority either conducts direct supervision or checks the work conducted by the self-regulatory bodies of the professional organizations.

58. At the international level, Switzerland has actively participated in the conclusion of the Declaration of the Basel Committee on Banking Supervision, which established the first international code of conduct for banks with the aim of preventing the misuse of the banking sector for the purpose of money-laundering. Switzerland has also participated in the work of the Financial Action Task Force on Money Laundering. In 1998, Switzerland was successful in passing its second Task Force mutual evaluation, which involves an assessment of a country's anti-money-laundering measures. The Task Force deemed the measures in force in Switzerland to be positive overall and drew special attention to the new Money Laundering Act. On 11 May 1993, Switzerland ratified Convention No. 141 on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime of the Council of Europe. The Convention and the law on mutual assistance in criminal matters provide Switzerland with an effective base for cooperation in combating cross-border crime at the international level by primarily targeting the financial instruments used by the criminals.

Syrian Arab Republic

59. In Syria, the criminal policy adopted since independence has been directed towards combating corruption and corrupt practices and the illegal transfer of funds, and towards taking the necessary measures to return funds to their original sources. This policy is reflected in legal texts included in the penal statutes and other laws, summarized as follows: (a) the penal law, which considers acts of corruption offences punishable by penal sanctions (bribery, influence peddling, embezzlement, exploitation of position); (b) the law on economic crimes, which strictly combats corruption and explicitly criminalizes the illegal transfer of funds; and (c) the law on currency and valuable metals, which imposes penalties for smuggling or taking out Syrian foreign currency and other means of payment, as well as for refusal to return funds which should be returned to Syria. Syria has established an administrative agency called the Central Control and Inspection Authority. Its task is to investigate offences committed by State employees, foremost among which are offences related to corruption. It has also established Economic Security Courts, whose competence includes the trial of persons who have committed offences involving corruption and the smuggling of funds.

Turkey

60. Turkey signed and ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 1 February 2000. Turkey joined the Financial Action Task Force in September 1991 and has taken, inter alia, the following measures against money-laundering: (a) Ratification of

the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, in 1995; (b) requirement for the banks to identify their customers whose transactions exceed two billion Turkish liras by a Decree of the Council of Ministers, issued in September 1996; (c) enactment of Law No. 4208 on the Prevention of Money Laundering in November 1996; (d) establishment of the Financial Crimes Investigation Board, in accordance with Law No. 4208, in February 1997; (e) entry into force of the Regulation on Controlled Delivery, in September 1998; (f) issuance of the General Communiqués on the procedures regulating customer identification and suspicious transactions, in December 1997; (g) entry into force of Law No. 4358 on the Generalization of Usage of Tax Identification Number, on 4 April 1998; and (h) the new Banks Act was put into effect on 23 June 1999. According to subparagraph (4) of article 20 of this law, banks are prohibited from opening any account and conducting any banking services for customers who do not submit their identification information and tax identification numbers.

61. Major points in the Turkish legislation against money-laundering can be itemized as follows:

(a) Dirty money means money and monetary instruments, property and proceeds derived from illegal activities. A number of illegal activities have been enumerated as predicate offences in Law No. 4208;

(b) According to Law No. 4208, the offence of money-laundering means utilization of the proceeds derived from predicate offences by offenders in order to legitimize them. In addition, the following acts are also defined as money-laundering offences: acquisition and possession of dirty money; utilization of dirty money by acquirer; changing or hiding the source, nature, possessor or owner of dirty money; concealing dirty money; and cross-border transactions of dirty money and disguising of such transactions;

(c) Article 9 of the Law also specifies provisional seizure, freezing and confiscation measures. Seizures can be ordered with respect to property, negotiable instruments, cash and other values. According to article 36 of the Turkish Penal Code, which regulates confiscation, the belongings of sentenced persons deriving from activities which engender offences are subject to confiscation. Therefore, instruments used in money-laundering may be confiscated as a punitive sanction;

(d) The Financial Crimes Investigation Board established in accordance with Law No. 4208 is entrusted with authorities and duties specified in the Law. In addition to the duties specified in the Law, the Board has the authority to evaluate suspicious transaction reports and to initiate investigations of suspicious transaction reports. The Money Laundering Law has also established the Coordination Board for Combating Financial Crimes. The Board is responsible for coordinating the activities conducted by the Board with the relevant institutions and organs; determining the policies with regard to implementation; setting up regulations; and evaluating proposals concerning money-laundering legislation;

(e) The Regulation on the Implementation of Law No. 4208 has set forth the principles and procedures for customer identification, suspicious transactions as well as investigation and research methods. The Financial Crimes Investigation Board is a member of the Egmont Group since June 1998 and participates in the work of the South-east European Cooperation Initiative. In an additional effort to contribute to effective crime prevention, Turkey has enacted a new Law on the Prevention of Profit-Oriented Criminal Organizations, which entered into force on 1 August 1999. This Law No. 4412 covers matters related to issues which are addressed by the United Nations Convention against Transnational Organized Crime.

Ukraine

62. The Ukrainian Ministry for Internal Affairs is engaged in ongoing measures to prevent and combat corrupt practices and the illegal transfer of funds abroad. Combating corruption is one of the most important activities of the Ministry's units. Various organizational, legal and practical measures are being taken to implement the provisions of the Anti-Corruption Act of 5 October 1995, the National Concept on Measures to Combat Corruption for 1998-2005, and other regulations dealing with efforts to fight corruption. The main purpose of these measures is to establish an effective system to counteract and prevent corruption. The Ministry for Internal Affairs has also participated actively in the drafting and discussion of the bill on the prevention and combating of the laundering of the proceeds of crime. Specific proposals have been made to improve the Banks and Banking Act and the draft Criminal Code of Ukraine. Article 209 of

the amended Criminal Code of Ukraine, which was adopted by the Parliament in April 2001, provides that the "laundering of monetary and other assets acquired through criminal activity" shall be prosecuted.

63. In accordance with Instruction No. 19402/1 of 23 November 2000 of the Prime Minister of Ukraine, relating to the implementation of paragraph 2 of the Presidential Decree of 16 November, the Ministry for Internal Affairs has drafted a plan of measures for 2001 to combat corruption and the corresponding draft decision by the Cabinet of Ministers. The main objective of the plan is the implementation of effective, coordinated, practical and preventive measures by State executive bodies aimed at detecting, preventing and eliminating corruption within the State, establishing priorities for such activities, ensuring effective compliance with legislation on measures to combat corruption, and scrutinizing and making timely amendments and additions to such legislation. The Ministry of Internal Affairs also attaches particular importance to developing cooperation with law enforcement bodies of other countries on the basis of inter-agency bilateral agreements. Ukraine is currently party to or associated with 128 international legal instruments relating to legal assistance in criminal matters, measures to combat crime, international cooperation and other issues connected with the activities of internal affairs bodies.

United Kingdom of Great Britain and Northern Ireland

64. In the United Kingdom, administrative arrangements are currently in place to enable the sharing of assets received as a result of the enforcement within the United Kingdom of a confiscation order made by a foreign jurisdiction. The apportionment of the proceeds is decided on a case-by-case basis, taking into account such factors as the contribution made by the relevant overseas country to the confiscation. At present, the maximum amount which can be shared is 50 per cent of the sum realized once enforcement costs have been deducted. However, the United Kingdom is prepared to consider increasing (bearing in mind its own costs) the proportion of funds to be repatriated in cases where a country's funds have been looted by a corrupt politician.

United States of America

65. The United States has recently taken a number of steps to improve both national and international cooperation involving official corruption. Pursuant to the 2000 National Money Laundering Strategy, the United States examined its national laws and procedures that permit the investigation and prosecution of such cases, and the mechanisms available to locate diverted assets and return them to their rightful owners. The United States also undertook to examine and improve inter-agency coordination at the national level in such cases. The United States Department of Treasury, again pursuant to the National Money Laundering Strategy, coordinated a Government-wide effort to issue guidelines on "Enhanced Scrutiny for Transactions that May Involve the Proceeds of Foreign Official Corruption". At the international level, the United States worked with the member States of the Group of Seven major industrialized countries, all of whom prepared and shared inventories of their law and procedure in this area, then undertook a comparative review of that Group's national laws and capabilities in this area. On a practical level, the United States has responded swiftly to specific requests from other nations for help in combating foreign official corruption. Recently, the former Prime Minister of a foreign State, who is accused of laundering the proceeds of corrupt activities in his homeland, was indicted; several offenders accused of large-scale corruption were extradited to the countries in which the offences took place; various requests for assistance in obtaining bank records and other evidence for nations seeking assistance in tracing unlawfully acquired assets were executed; and millions of dollars in connection with corrupt activities have been located and frozen.

Zimbabwe

66. In Zimbabwe, there is no adequate institutional framework for the prevention and combating of corruption and other serious related crimes. There is no independent statutory body in place to deal with the crime of corruption. The Government, through the Constitutional amendment 5/2000, legalized the establishment of an Independent Anti-Corruption Commission to prevent, investigate and prosecute corruption and related serious commercial crimes. To this end the Government is currently working on an Anti-Corruption Bill, which provides comprehensively

for the Commission. The Commission will be established as soon as the Bill has become an Act of Parliament. As far as the regulatory framework is concerned, the criminal offence of corruption is regulated by the Corruption Act (chapter 9:16) which outlines the practices that would constitute an offence. The common law offence of bribery is also provided for in the Act. However, the Act is not comprehensive enough and not quite effective in dealing with the issue of corruption. It is narrow in its outlining of acts considered to be corrupt practices, especially in comparison with the Southern African Development Community Protocol against Corruption. The Act is also outdated in comparison to modern trends of the crime of corruption. For these reasons the Government is currently working on a new Corruption Bill. The crime of money-laundering is regulated by the Serious Offences (Confiscation of Profits) Act (chapter 9:17). The Act was, however, specifically enacted to provide for the confiscation of the proceeds of crime. Thus, there is still need to strengthen the regulatory framework in this instance in order to comply with the resolution on preventing corruption and related crimes. The Government is working on a Money Laundering Bill which deals more comprehensively with the crime. In as far as repatriation of illegal funds is concerned, the Criminal Matters (Mutual Assistance) Act (chapter 9:06) and the Serious Offences (Confiscation of Profits) Act (chapter 9:17) make provision for the search and seizure of property believed to be proceeds of crime or related to an offence and the enforcement of orders. Thus, the illegal funds can be repatriated in terms of these provisions.

B. Measures adopted by relevant entities of the United Nations system[4]

United Nations Development Programme

67. In July 1998, the Executive Committee of the United Nations Development Programme (UNDP) approved the corporate position paper, entitled "Fighting corruption to improve governance", to guide its work in this important area. At the heart of this response is the UNDP holistic approach of tackling corruption as a problem of poor governance. Fighting corruption is a critical component of establishing democratic governance, a key priority in the commitment of UNDP to eradicate poverty.

68. Although a major portion of the work of UNDP deals with improving efficiency and accountability of public administration systems and strengthening independent government oversight capacity, UNDP is increasingly engaging the business community in the fight to prevent corruption, bribery, money-laundering and the illegal transfer of funds. At the global level, UNDP will be facilitating a session at the upcoming tenth International Anti-Corruption Conference, to be held in Prague from 7 to 11 October 2001, dedicated to highlighting good practices of multinational corporations in combating corruption. The session will also present possible models for other private firms to conduct business accountably and transparently in developing countries.

69. At the regional level (in Africa and the transition economies of Eastern Europe), UNDP is looking closely at the role of private companies, particularly in extractive countries, in reducing corruption and improving stability. At the country level, UNDP has been critical in brokering dialogue among private sector (particularly local chambers of commerce), government and civil society representatives, as part of policy consultations to develop national anti-corruption strategies, among others, in Bolivia, Burundi, Mauritius, Mongolia and the United Republic of Tanzania.

United Nations Conference on Trade and Development

70. From 1979 to 1981, the Division on Investment, Technology and Enterprise Development of the United Nations Conference on Trade and Development (UNCTAD) secretariat, in its previous incarnation as the United Nations Centre on Transnational Corporations, negotiated an International Convention on Illicit Payments in International Business Transactions under the aegis of the Economic and Social Council. An almost complete draft of the Convention, with very few outstanding issues to be resolved, was submitted by the Council to the General Assembly for adoption. The Assembly took no action at that time. The text of the draft Convention later inspired other initiatives, such as the recent OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Since then, the topic of corruption in international business transactions has been dealt with as an integral part of the work on international investment agreements,

standards and codes of conduct for transnational corporations.

71. The Centre on Transnational Corporations provided substantive advice and technical support to the design of Transparency International, one of the leading international organizations solely dedicated to the fight against corruption. Recently the Division on Investment, Technology and Enterprise Development launched a technical cooperation project entitled "Building capacity on good governance in investment promotion and facilitation". The project aims at addressing the negative effects of corrupt practices on investment location decisions by transnational corporations, and at preventing non-transparent practices in host countries from affecting the flows of quality investment to developing countries.

72. The Globalization and Development Strategies Division of UNCTAD derives its interest in money-laundering from the growing importance attributed to it in the context of policy issues included in its mandate on global interdependence and development. One such issue is the formulation and implementation of financial codes and standards as part of international financial reform. This subject was covered in part two, chapter IV, of the *Trade and Development Report, 2001*, section B.9 of which was a summary of the theme of market integrity and money-laundering. Complete consensus does not yet exist on the way in which money-laundering should be handled as part of financial governance and how international institutions should respond to the pressures on them to participate in combating money-laundering. The concerns of many developing countries in this area are evident.

C. Tenth session of the Commission on Crime Prevention and Criminal Justice[5]

73. During the thematic discussion held at the tenth session of the Commission on Crime and Criminal Justice (Vienna, 8-17 May 2001), on progress made in global action against corruption, it was noted that combating corruption requires an evidence-based, comprehensive, transparent, integrated, non-partisan and long-term approach at the national and international levels. A number of speakers expressed the view that a comprehensive approach would include efforts to strengthen institutional and legal frameworks, effective law enforcement and measures designed to limit opportunities for corruption, to prevent transfers of illicitly acquired funds and to repatriate such funds. Such a comprehensive approach would also entail measures aimed at awareness-raising and public education, as well as continuous monitoring of the progress made and evaluation of the results achieved. It became evident during the discussion that many national anti-corruption strategies had been inspired by the need to adopt such a comprehensive approach.

74. Several delegations expressed a preference for the use of an evidence-based approach to gauge the extent of corruption. Many Member States had begun following such an approach by conducting comprehensive assessments of the levels, causes, locations, types, costs and effects of corruption. Some of those States had done so within the framework of the Global Programme against Corruption of the United Nations Centre for International Crime Prevention or programmes of other international agencies; others had done so independently.

75. With respect to civil society, one delegation frequently expressed the view that it was important to change the cultural acceptance of corruption and to develop integrity and civic morality; that implied that citizens had a responsibility to provide information on incidents involving corruption. It was emphasized that, to do that, the public needed to have access to information and must be protected by appropriate legislation, such as "whistle-blower" laws. Most importantly, the public must have confidence and trust in the institution of government. Speakers also emphasized the importance of enhancing the capacity and competence of civic organizations and of empowering the victims of corruption.

76. Public sector reforms to increase accountability, efficiency and transparency were widely viewed as being essential. Such reforms included the elimination of cumbersome regulations that provided opportunities for corruption. They also included system-wide reorganization allowing for transparent decision-making processes in all government operations. Speakers identified transparency in party financing, the legitimate promotion of special interests (such as lobbying) and disclosure of the assets and income of decision makers as important components of prevention and control strategies and policies.

77. Concerns were raised about problems encountered by anti-corruption agencies and institutions in the criminal justice system with regard to creating and maintaining integrity, independence and accountability. Many speakers referred also to the importance of having national laws on both the sanctioning of corrupt practices and the confiscation of proceeds, including provisions relating to the burden of proof.

78. In connection with the question of preventing and combating the transfer of funds of illicit origin and returning such funds, many speakers stressed that the matter was very complex, involving a number of substantive, conceptual, political and legal issues. It was noted that there were a number of problems that countries, especially developing countries, had great difficulties in addressing alone. Cases of transfer of funds of illicit origin were difficult to build, manage and successfully prosecute. They frequently involved a series of transactions made using sophisticated means and, as a consequence, the collection, analysis, preservation and presentation of evidence was a challenge that often had a bearing on the credibility and success of the cases. The success of efforts to return funds of illicit origin might hinge on the formulation of requests for mutual legal assistance or for assistance in freezing, restraining and confiscating assets in accordance with the requirements of relevant arrangements or agreements or in compliance with legislation in a number of requested States. The process of formulating and responding to such requests was a lengthy one under the best of circumstances and any deviation from statutory or evidentiary requirements might not only lengthen the process, but also impede the ability of States to render assistance when requested to do so. In most developing countries, there was a dearth of specialized expertise, which was often exacerbated by the state of institutions in the country in question, which might be emerging from a particularly trying period of its history. Conducting a successful effort was virtually impossible without that specialized expertise and obtaining specialized professional assistance — in most cases, an expensive proposition — was often not an option for smaller and poorer countries. Differences in legal systems had hindered efforts to freeze and return funds of illicit origin, and measures were needed to foster mutual understanding of legal systems.

79. Strong support for international measures aimed at enforcing "due diligence" regulations in the banking industry to prevent high-level public officials from hiding stolen assets in foreign banks was expressed. A number of speakers voiced the concerns felt by many about the risks associated with the return of funds of illicit origin in a domestic environment where corruption might still be perceived to be systemic. In such cases, there were concerns about the recurrence of the problem, fuelled by the availability of the returned funds. Finally, several delegations recommended that, in order to address that problem, a system involving the appointment of independent custodians of returned funds should be considered. Another proposal called for a portion of recovered assets to be designated to fund integrity-building at the national level.

80. On the issue of the development of a new international legal instrument against corruption, the majority of Member States expressed their full support for the call of the General Assembly for such an instrument which, in the view of several delegations, should be given the form of a convention. As a general and preliminary observation, the view was expressed that the future legal instrument should build upon the experience of regional organizations, under the framework of which international legal instruments addressing corruption had been already negotiated, as well as of the United Nations Convention against Transnational Organized Crime.

81. Several speakers stressed that the new legal instrument should have a multidisciplinary approach and should cover a wide range of areas. In particular, reference was made to the issues of definition of corruption, definition of public officials, corruption in the private sector, sanctions, jurisdiction and international cooperation. Special emphasis was placed on the need for effective measures to prevent corruption, including measures to promote integrity and good governance, as well as the adoption of codes of conduct. In addition, some delegates highlighted the importance of including in the future legal instrument provisions against the application of bank secrecy laws to impede or hinder criminal investigations or other legal proceedings relating to corruption, as well as specific provisions on money-laundering to include the proceeds of corruption.

82. According to some delegations, the new legal instrument should also provide for technical and operational assistance to developing countries with a

view to strengthening their institutional capacity to enforce anti-corruption measures, as well as investigating and prosecuting the offences specified in the future instrument. Other proposals were presented during the discussion, including one on the establishment of a mechanism for compensation to parties who had suffered damage as a result of an act of corruption. The need for establishing a mechanism to monitor the implementation of the future legal instrument was also stressed.

83. There was broad recognition of the need that the future legal instrument should address the question of illegally transferred funds and the repatriation of such funds to the countries of origin. Numerous delegations highlighted their view that the new instrument should focus more on the issue of illicitly obtained funds than on the issue of their transfer abroad, since most of the time, the latter was done within the framework of legality.

D. Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption

84. The Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption was held in Vienna from 30 July to 3 August 2001.[6]

85. During the discussion, consensus emerged on the fact that the instrument should be the "United Nations Convention against Corruption". It was pointed out that the new convention should be developed taking into account existing international legal instruments against corruption. It was deemed important to ensure that the new convention would build on the achievements of those instruments and not set lower standards. Further, it was noted that the United Nations Convention against Transnational Organized Crime contained many provisions that encompassed useful solutions and represented significant achievements that had been reached by consensus. To the extent possible, the new convention should make full use of those provisions in order to facilitate and expedite the process of negotiation.

86. As regards the possible content of the new convention, the Expert Group recommended for consideration by the ad hoc committee, which is the body mandated by the General Assembly to negotiate the new instrument, a number of elements, including: definitions; scope; criminalization; prevention; sanctions; confiscation and seizure; international cooperation, including extradition, mutual legal assistance and law enforcement cooperation and exchange of information; technical assistance; transfer of funds of illicit origin and return of such funds; and mechanisms for monitoring implementation. The Expert Group expressed the view that the list of elements should also include jurisdiction, liability of legal persons, collection, exchange and analysis of information and protection of witnesses and victims. There was general agreement that the list was not intended to be exhaustive and that the final determination of which elements would be discussed and in what form was incumbent upon the ad hoc committee.

87. Many delegations deemed it essential that the new convention effectively address the question of the transfer of funds or assets of illicit origin and the need to develop adequate measures to ensure the return of such funds or assets. In this connection, some delegations were of the view that the question of identification of the legitimate beneficiary of funds or assets of illicit origin, as well as the question of title over those funds or assets would need to be addressed. Economic and Social Council resolution 2001/13, in which the Council called upon the Expert Group to consider, inter alia, the issues of strengthening international cooperation and promoting ways and means of enabling the return of such funds, defining funds derived from acts of corruption and proceeds of crime, as well as establishing criteria for the determination of countries to which funds should be returned and the appropriate procedures for such return, was seen to constitute a useful basis for the deliberations of the ad hoc committee on this matter.

88. The report on the meeting of the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption is submitted to the General Assembly at its fifty-sixth session as document A/AC.260/2 and Corr.1.

III. Preventing and combating the transfer of funds of illicit origin and returning such funds

A. Overview of the main issues involved

89. Various forms of corruption create a range of problems that many countries and international organizations have been addressing during the last decade. Cases of large-scale corruption, especially where high-level government officials are implicated, commonly involve immense amounts of wealth and the transfer or diversion of this wealth outside of the country concerned. In many cases, the amounts involved represent a significant proportion of that country's overall resources and their diversion represents significant harm to its political stability and economic and social development.

90. One important step towards curbing such cases would be to ensure that this type of crime "does not pay". However, this is not the current experience. Even when a corrupt ruler is overthrown or dies, recovery of diverted assets is complex and cumbersome. Indeed, attempts to trace and repatriate illegally exported wealth in such cases are commonly frustrated and may sometimes lead to friction between the States or Governments involved. Even the strongest and most persistent efforts have not been crowned with full success.

91. There are both practical and legal issues involved in the recovery of funds illicitly obtained and exported in cases of large-scale corruption. To some degree there is inevitable overlap between these categories. For example, the fact that a State in which assets are believed to be located imposes certain procedural requirements which a State seeking information cannot meet, could legitimately fall under both categories. It might be seen as a practical problem in the sense that practical factors such as lack of resources or technical expertise, or the simple failure of an investigation to obtain necessary information may prevent a State from meeting the requirement. It could also be considered a legal problem in the sense that the requirements may be imposed by legislation in the requested State which is not compatible with the legislation of the requesting State.

1. Practical issues

92. Cases of recovery of diverted proceeds of corruption, especially those involving large amounts of such proceeds, generally include the following stages:

(a) Misappropriated assets must be traced to their present geographical location and, in cases where they have been converted from one form to another, to their present form (i.e., real estate, bank deposits and stored cash or valuables);

(b) Once identified, the assets must be secured or protected against further attempts to conceal them or move them beyond the reach of authorities, usually by some form of legal "freezing";

(c) Some form of criminal conduct must be established as the source of the assets, and the assets must then be linked to that conduct, often untangling complex transactions specifically intended to conceal their criminal origin.

93. The globalization of economic systems and the technologies supporting it have generally made it easier for offenders to move, disperse and conceal illicit assets. Tracing diverted assets, particularly in the amounts generated by large-scale corruption cases, usually involves complex, lengthy and expensive investigations. These must be considered with great care and diligence because the evidence obtained must generally meet a high standard to ensure successful civil or criminal freezing and forfeiture proceedings under a variety of legal systems. The same evidence used to trace, freeze and forfeit the assets may also be needed to prosecute offenders in domestic courts.

94. The sophistication of the primary offenders themselves, the resources at their disposal while in power and their ability to engage the services of experts may also give rise to very complex schemes for laundering and concealment and equally sophisticated investigators and techniques are required to defeat them. Permission to engage in the intrusive means of investigation needed to support such investigations may be unavailable in some jurisdictions or unobtainable in transnational investigations.

95. Costs and related demands on law enforcement personnel and resources may also pose a serious practical obstacle, particularly for countries already impoverished by the offenders whose assets they now seek to trace. The financial costs of assembling an effective team of investigators to trace and recover

assets, and sufficient numbers of people with the necessary expertise may not be available even if the financial resources are present. Investigator teams must usually either include or work effectively with lawyers, forensic accountants and other experts. In some countries identifying, freezing and recovering assets may be a more complex and lengthy process than in others.

96. The results may be yet more elevated costs. In some cases and some jurisdictions law firms, investigators and others may be willing to work on the basis of fees which are contingent on a successful investigation and the ultimate recovery of assets. However, the size of many large-scale corruption cases makes this impracticable, while some jurisdictions prohibit such practices. Further, the financial incentives involved may give rise to conflicts of interest which could jeopardize the viability of legal proceedings for recovery or criminal prosecutions. In some cases, the costs of civil proceedings may be partially covered by the State in which they are brought, if the State itself uses civil proceedings to pursue the assets. On the other hand, many countries' legal systems may not accept ex juris civil litigation without some indication that the plaintiff or applicant has assets in the jurisdiction of the court or without requiring some form of security deposit against which costs can later be recovered if awarded against that party. This concern would be more acute in cases where the plaintiff is a foreign State which could later raise immunity against costs or damage awards if it loses the litigation.

97. The multinational nature of the offences also makes it necessary to assemble teams which include experts from the various jurisdictions involved and the coordination of their efforts. An effective investigative team must establish basic facts, identify leads and sources of information, develop and analyse intelligence, gather information in such a way that will make it admissible as evidence not only in freezing and recovery proceedings, but in many cases in criminal prosecutions as well, and either litigate cases themselves or hand them over in a viable form to prosecutors or other counsel who will do so. In many cases, this will involve choosing the most appropriate jurisdiction in which to bring each of the various legal proceedings. This requires a tactical assessment of the comparative advantages and disadvantages of each legal system, while at the same time ensuring that evidence gathered and judgements obtained in each jurisdiction will be recognized in all of the other key jurisdictions. Some common-law countries are sympathetic to requests for orders to freeze assets, while others offer more advantageous prospects for the legal discovery of evidence, for example, but this may provide no advantage unless the discovered evidence can be used where it is needed and the assets can be frozen wherever they are actually located.

98. Further practical problems stem from the ease and speed with which assets can be moved, converted or concealed, and by the length of time commonly consumed by the complexities of both domestic and transnational investigations. The time consumed by mutual legal assistance requests is a major problem for investigators, particularly in cases where assets or evidence must be traced through a series of jurisdictions, because each jurisdiction has legal proceedings which must be completed and requirements which must be met before the case can then pass to the next jurisdiction, where the process must be repeated. Sophisticated offenders understand this and structure their activities to take advantage of it. Investigators are often confronted with a conflict between discovery and recovery, in which the former demands painstaking and time-consuming investigation, while the latter requires fast, decisive action to seize or freeze assets.

99. Practical problems also arise from the need to transfer evidence from one jurisdiction to another in a manner which ensures that it will be admissible and credible where it is used in court. Asset recovery cases often straddle the boundary between civil and criminal proceedings or may be considered civil in one jurisdiction and criminal in another. Many jurisdictions impose higher standards for criminal evidence which may make civil recovery easier where it is feasible, but make evidence gathered for civil proceedings insufficient to meet the standards for criminal ones. To establish authenticity, witnesses such as bank officials or investigators must often travel to give personal testimony, which generates costs and demands on their employers. Recent developments may make such testimony by videoconference possible, but this also raises legal, cost and technical issues, and in some cases the evidence thus given may not be as effective.

100. In the final stages of a successful recovery effort, practical problems may also arise over the ultimate disposition of the assets. Assets which have been seized or frozen may generate costs or practical

problems associated with such things as the need to preserve the value of property or manage companies until they can be liquidated and, in some cases, it may be more appropriate to simply transfer the asset itself. There may be competing claims from countries other than the victim country, and competing claims from various individuals and companies which may have suffered losses for compensation. Within the victim country, there may be competition between proposals to use the assets to compensate individuals and proposals to use them for projects to rebuild political, economic and legal institutions, the reduction of external debt or various public works.

2. Legal issues

101. A major concern in all cases of a multinational nature is the reconciliation of differences or discrepancies in the relevant substantive and procedural laws of the countries involved, and issues of this nature commonly arise in asset recovery cases. The most serious problems tend to arise in cases involving civil law and common law jurisdictions because of the fundamental differences involved, but legal asymmetries can cause difficulties even between relatively similar legal cultures, particularly with respect to the exact definition of criminal offences and areas, such as the liability of corporations or legal persons.

102. Another area of major concern arises out of different philosophies and traditions with respect to the demarcation between civil and criminal proceedings. For example, the concept of "civil forfeiture" is alien to the majority of national legal systems. It has become an important tool for dealing with proceeds of crime, but some countries consider it improper to apply civil measures, which generally have lower evidentiary standards and procedural safeguards, to achieve penal or criminal objectives. In some countries individual victims may seek compensation as "parties civiles" to criminal proceedings, but many countries do not have this concept, and those which do may set a high standard for establishing such status and the proof of damages.

103. Another significant area of discrepancy between legal systems relates to fundamental principles governing protection of civil liberties, privacy, disclosure of prosecution information and evidence to the defence in criminal cases, and other substantive or procedural safeguards. While the substance of many of these principles may be similar in many countries, the manner in which each country's laws enunciate such principles, and the ways in which their courts apply them may be quite different. Thus, even though evidence was properly obtained by means of lawful search and seizure in one country, for example, this may be difficult to establish in the courts of another.

104. Conflicting legal rules may impede the cooperation of people and organizations operating under the laws of different countries. Occasionally, compliance with a legal rule or judicial order in one jurisdiction can entail a legal breach in another. One example commonly encountered in recovery cases involves the obligation to disclose information in one place which may be prohibited by rules applying to the protection of privacy or confidentiality in another. Conflicts and inconsistencies of this nature are on the increase as telecommunications and computer networks bring information and the operation of national legal systems into ever-closer proximity. Cases have arisen where financial institutions claim that they are not allowed to share records that are physically located in a jurisdiction with strict secrecy rules, even if the records are directly accessible to computers located in a jurisdiction which has requested or sought to compel their disclosure. The very nature of modern computer networks can even make the basic determination of where information is physically located problematic.

105. There are also discrepancies between the approaches taken by different jurisdictions to the use of civil, as opposed to criminal, proceedings for the tracing, freezing, seizure and forfeiture of illicitly transferred assets. Generally, criminal means allow for more effective remedies, but their penal nature establishes a higher burden of proof and more stringent procedural safeguards which must be met before they can be applied. The higher burden is commonly cited as a major obstacle to the ability of investigators to locate evidence and trace assets and transactions through nominees, shell corporations, foundations, lawyers barred from disclosing their clients' identities and institutional secrecy on the part of banks and financial institutions in jurisdictions where this is established. Civil proceedings, on the other hand, offer more realistic burdens of proof, but in many jurisdictions legislation and/or the courts do not regard such proceedings as adequate to overcome secrecy provisions. In some cases, the best approach appears to be a combination of the two, in which criminal

proceedings are used to obtain access to necessary information (the equivalent of civil discovery), and then civil proceedings brought as a more expeditious way to seek actual freezing and recovery of the illicit assets. This approach is possible in some civil law countries, but very hard in common law jurisdictions.

106. The details of legislation and case law, particularly in civil proceedings, also vary significantly from case to case. A range of approaches to civil "freezing" exist: in some places, civil freezing is available with a relatively low burden of proof, but freezing orders are preparatory, temporary, and without prejudice to subsequent proceedings. Increasingly, civil courts may be willing to order the freezing of assets to prevent removal or dissipation, and the preservation of evidence using injunctions and orders similar in nature to criminal procedures for search, seizure and freezing, but the intrusive nature of such measures itself ensures a relatively high burden on applicants, and subjects them to potential liability in damages should assets be frozen and the subsequent civil case not be proven.

107. As already noted, discrepancies between the evidentiary procedures or rules in different jurisdictions are also frequently encountered. Evidence gathered by regular means in one jurisdiction may not meet the standards for admissibility in others, particularly if both civil and criminal proceedings are involved. Other rules also limit admissibility. Evidence furnished to one country under mutual legal assistance agreements may not be used in a third country or for proceedings other than those for which it was originally obtained.

108. The practical problems associated with transferring witnesses from one jurisdiction to another may also have legal implications. Assuming that resources can be found to transfer the witness, the questions of whether he or she can be transferred and compelled to testify against his or her will, and potential criminal liability for refusal to give evidence or perjury must sometimes be dealt with. In some cases, the question of whether a foreign witness can be given immunity from prosecution for related or unrelated offences and if so, the extent of such immunity, may also arise.

109. Assuming that civil litigation is chosen as the primary means of tracing, freezing, and recovering transferred assets of illicit origin, the question of who should be targeted by the litigation raises both tactical and moral issues. In choosing civil defendants, tactical considerations, such as which possible defendants are most vulnerable, owing to their country of residence or involvement in the corruption or transfers of funds of illicit origin, may require litigators to weigh the need to successfully recover assets against the desire to pursue those seen as most culpable. Similar issues are raised by the question of whether to proceed with multinational civil proceedings or whether to focus on using the domestic criminal law of the countries involved. In some cases, the need to move quickly against assets and reliance on the lower procedural burdens of civil procedure may contaminate vital evidence to the point where criminal proceedings against the perpetrators can no longer be sustained.

110. The laws and courts of the country seeking recovery may have been compromised to the point where they cannot be used effectively, particularly in criminal proceedings. Even if the new regime adopts judicial and legislative reforms to the point where its system could sustain the necessary proceedings, former leaders may be able to raise State sovereignty and immunity doctrines to avoid liabilities for their actions while in power. They may also be able to argue successfully that new criminal laws effectively create retroactive crimes in order to block requests for mutual legal assistance or extradition on the basis of human rights protections or rules against dual criminality.

111. The length of time needed to restore the basic rule of law in practice in victim countries may also prove problematic, since it can prevent that country from requesting speedy assistance in pursuing both offenders and their assets. In seeking mutual legal assistance, for example, treaties generally require some threshold basis for establishing that an offence has been committed and that the particular form of assistance sought will aid in its investigation and prosecution. Further, in seeking the freezing or forfeiture of assets because they are proceeds of crime, evidence establishing the commission of the crime and tracing and linking the targeted assets to it is needed. Sometimes, this is not possible in the short term, because the institutional breakdown in the country has been so extensive that there is inadequate judicial capacity or because the necessary legislation (substantive and procedural) may have not yet been enacted.

112. As discussed above, the practical problems which arise when there are conflicting claims because their

recovery is sought by other countries or individuals claiming criminal victimization or civil damages, may be compounded by additional legal problems. Proceedings brought in more than one jurisdiction may result in competing judgements claiming the assets which have to be reconciled before the courts of the country where the assets are located, for example. Civil damage claims which would pay damages to plaintiffs may also come into competition with criminal law claims which confiscate assets for the benefit of the State or which would be used to compensate criminal victims.

B. Technical assistance activities of the United Nations Office for Drug Control and Crime Prevention

113. In resolution 55/188, the General Assembly, while recognizing the importance of national measures, called for increased cooperation, inter alia, through the United Nations system, in regard to designing ways and means of preventing and addressing illegal transfers, as well as repatriating illegally transferred funds to the countries of origin. The Economic and Social Council, in its resolution 2001/13, adopted in July 2001, specifically requested the United Nations Office for Drug Control and Crime Prevention to support Governments that seek technical assistance in combating the transfer of funds of illicit origin and in returning such funds, while Governments and multilateral financial institutions and regional development banks, as appropriate, were invited to support the Office in its efforts to assist Governments that request such an assistance.

114. In recent months, the Office has received several requests for technical assistance in the field of the recovery of funds of illicit origin transferred abroad.

115. In November 2000, upon the request of the Government of Nigeria, the United Nations Centre for International Crime Prevention, together with the Global Programme against Money Laundering, organized a mission to that country, inter alia, with the purpose of conducting a preliminary assessment of the feasibility of pursuing an asset recovery initiative there. The mission met with all key players in the field of asset recovery in Nigeria, including the Attorney-General, the Solicitor General, the National Security Adviser, the Chairman of the Special Investigative Panel, the Chief Justice, several Supreme Court judges, the Chairman of the Anti-Corruption Commission and the Inspector General of Police.

116. With regard to the asset recovery initiative, the mission discussed the scope of asset recovery and explored the status of the asset recovery programme of the Nigerian Government and, in particular, the amounts recovered, the status of legal procedures, and the relationship of the Nigerian authorities with their legal counsel in Switzerland. In May 2001, the Executive Director of the United Nations Office for Drug Control and Crime Prevention, on the occasion of his mission to Nigeria to discuss the country's ratification of the United Nations Convention against Transnational Organized Crime and its protocols, met with top government officials to further discuss the issues of corruption and assets recovery.

117. In order to explore the most appropriate way of responding to the request of Nigeria, as well as to develop ideas, guidance and technical expertise in developing its role in the recovery of funds illegally obtained and the repatriation of such funds, the Office assembled a team of top-level experts in Vienna from 26 to 28 March 2001.

118. The experts considered problems associated with the transfer of ill-gotten funds out of countries by persons in positions of power or influence, such as corrupt political leaders or top government officials, the tracing and identification of such funds, and the eventual return of such funds. Specific problems and issues which have confronted Governments and officials were examined, including problems associated with: (a) the tracing of diverted assets; (b) the freezing of funds, once identified; (c) legal procedures required to successfully claim, identify and recover assets; and (d) the return of such assets to victim countries and other possible claimants.

119. The experts stressed the fact that differences in key areas, such as political traditions, legal practices (i.e. common and civil law systems), constitutional and procedural safeguards and evidentiary rules must be reconciled in order to use legal means to recover assets. They also identified a number of practical problems relating to the successful development, management and conclusion of cases arising from the fact that cases are generally multinational in nature.

120. In July 2001, upon the invitation of the Vice-Minister of Justice of Peru, the United Nations Centre

for International Crime Prevention undertook a mission to that country to discuss its ratification of the Convention against Transnational Organized Crime. Through a number of meetings held with the President of the Supreme Court of Justice in Lima and with other anti-corruption judges, prosecutors and attorneys, the mission studied the assets recovery initiatives of the country and identified the main problems faced by Peru in undertaking such initiatives.

IV. Conclusions and recommendations

A. Conclusions

121. In recent years, it has become apparent that high-level corruption is a major obstacle to key objectives of the international community, including social and economic development, establishment of the rule of law, the development of trust and confidence between Governments and their populations, and the development of stable, peaceful relations between countries. It has also become apparent that the recovery of the assets looted from national economies and transferred abroad in such cases will have to form part of the solution to this problem. Recovery can make a critical difference to societies and economies damaged by the corruption which generated the assets. It is also needed as part of a larger effort to deter corruption by sending the message that the offenders will not be allowed to profit from it.

122. The complexities of the issues surrounding the transfer of illicit funds, derived from acts of corruption, and the return of such funds, cannot be underestimated. These complexities derive as much from the nature of the activities that produce the illicit wealth, as from the difficulties associated with the authors of these activities and their position of power. Such complexities are compounded by corollary factors, such as gaps in domestic legislation, perceived deficits in legitimacy of processes initiated to establish facts and determine culpability and, last but not least, the current deficiencies in international cooperation.

123. The problems encountered in approaching and addressing these issues range from properly conceptualizing such issues to adequately identifying the content, parameters and extent of their international dimensions.

124. An illustration of the conceptual and technical difficulties involved is the recent evolution in the terminology employed by the international community to approach the issues of the transfer of illicit assets and their return.

125. This evolution took place after the Commission on Crime Prevention and Criminal Justice had the opportunity at its tenth session to devote the technical and political attention that the matter requires. Such evolution, as manifested in Economic and Social Council resolution 2001/13, is not only an indication of the need to define the problem and refine its understanding, but also a clear demonstration of the willingness of the international community to engage in substantive dialogue and seek appropriate and acceptable solutions.

126. Notwithstanding difficulties or complexities, the dimensions of the problem demand joint and conclusive action by the international community. For this action to be effective, the international community must embark on sustained efforts to forge consensus. Such consensus needs to be based on a common understanding of the constituent elements of the issue, a common perception and appreciation of its impact on national efforts towards development and on the international quest for globalization beneficial to all, and finally agreement on the international aspects of the problem that require genuine and meaningful cooperation.

127. The delineation of the international dimensions of the problem require a careful and thorough analysis of all issues that constitute its elements at both the national and international levels. The study mandated by the Economic and Social Council in its resolution 2001/13, for the attention of the ad hoc committee established pursuant to General Assembly resolution 55/61 to negotiate the new United Nations convention against corruption, will certainly help this analysis and advance common understanding.

128. While this work is under way at the international level, the international community cannot afford to fail to pay the appropriate attention to the immediate concerns and needs of a growing number of its members. Individual countries are facing increased frustration in pursuing efforts to recover illicit assets or to honour requests and render much needed cooperation in cases involving the recovery of illicit assets. Frustration, in turn, breeds misunderstanding

and disillusionment, which hamper international cooperation. Individual countries are turning to the United Nations, seeking assistance in their efforts to identify and recover illicitly obtained and transferred assets. The United Nations has the obligation to spare no efforts in rendering such assistance, and it is well positioned to do so. Its neutral nature, its ability to focus on the substantive aspects of the problem and minimize extraneous, sometimes politically charged, considerations and its capacity to combine experiences and expertise from many and diverse parts of the world, make the United Nations a viable source of technical assistance and a credible and efficient partner of other national and international institutions, organizations and agencies.

129. However, in order to perform these functions and not disappoint expectations, the United Nations needs the political, substantive and financial support of Governments from all States. Only by working together in finding solutions to these crucial problems will it be possible to produce results to which all States can subscribe and from which all States can benefit.

B. Recommendations

130. Provided that appropriate human and financial resources are made available, the United Nations system could provide a series of measures to assist Member States seeking assistance in relation with the transfer of funds of illicit origin and the return of such funds. Such measures fall into several categories. Those which could be taken up and applied immediately or within a relatively short time frame include such elements as assistance with training and the development of relevant expertise, advisory assistance for strengthening capacities for the management of ongoing cases, assisting with communications or mediation between concerned States and other practical and technical support proposals. Over the longer term, possibilities range from conducting further research and study of the problem, to the identification of a broad range of potential solutions for dealing with cases on a proactive and reactive basis, including through mechanisms to assist countries in establishing or strengthening their capacities to handle expeditiously relevant cases.

Assistance in capacity-building for case management

131. An area where the United Nations system should consider providing assistance is the one of capacity-building for case management. This would include collective assistance to all of the countries involved in international cases and more specific assistance to individual States which request it in areas such as the development of investigative expertise and the preparation of case materials adequate to meet foreign standards. A programme for capacity-building in case management that would provide support to requesting States for specific multinational cases could be established.

132. A first step to providing assistance in this area could be bringing together, on an ad hoc basis, officials involved in each case with the intention of identifying the main operational difficulties, such as the ones arising from mutual legal assistance proceedings, and of exploring the most appropriate ways of removing such difficulties. The United Nations, in view of its nature, which is global and *super partes*, would provide a neutral forum, in which problems blocking issues could be discussed. Meetings on each case would be conducted on an ad hoc basis, but the experience gained in dealing with each case would be used to good advantage in subsequent cases in areas such as the identification of common issues, the structuring of discussions and the development of appropriate technical expertise.

133. The United Nations would also be well-placed to provide assistance to individual countries in the coordination of efforts and the assembly of cases at the national level before other countries became involved, particularly once technical expertise was gained from international case-management experience. The need for fast action to trace and freeze assets and evidence and the problems encountered by many victim countries in quickly assembling cases sufficient to meet foreign requirements for such action were frequently raised by the experts, and concerns of this nature could quickly be addressed by providing advice and management assistance and/or technical support at the national level, before any international requests were made, and before domestic measures were taken which could prove prejudicial to the success of later proceedings in other countries.

134. Early assistance offered by the United Nations could include the following:

(a) Conducting of a thorough assessment in some countries to get a better understanding of the key issues involved;

(b) Provision of basic legal, technical and tactical advice to investigators, prosecutors or other officials about the foreign implications of early investigative measures, based on the experiences of earlier cases;

(c) Provision of advice on the identification of an appropriate case manager to deal with each case;

(d) Offering observers to ensure that collection of evidence, including testimony, would meet international standards;

(e) Provision of assistance in evidentiary matters, such as transcripts or records needed to establish the criminal origins and/or improper transfer of assets;

(f) Provision of assistance for officials of the requesting country with the development of document management and database management which would be used locally and in the global recovery effort;

(g) Provision of assistance to officials of the requesting country in identifying the appropriate agencies and officials of other interested countries for the establishment of formal or informal communications regarding the case.

135. The success of national case management assistance would largely depend on the early identification of a case manager and assisting that manager and the country concerned in developing an appropriate plan for building a national case, tracing illegally transferred assets, obtaining appropriate mutual legal assistance and other cooperation from other countries, choosing the most appropriate forums for bringing legal proceedings and the most appropriate form (e.g. civil or criminal) for those proceedings, coordinating measures taken in multiple jurisdictions, obtaining remedies such as the seizure or freezing of illegally transferred assets and the ultimate recovery of those assets. In some cases, the management plan would also have to consider the status of the case vis-à-vis other proceedings such as criminal prosecutions or competing or overlapping civil claims from individuals or other countries.

Creation of a civil recovery vehicle

136. One issue which commonly arises in cases where civil litigation proceedings are used to seek investigative, tracing, freezing or recovery remedies is the legal status of the applicant as a foreign Government coming before the courts of the requested State. In civil matters, for example, costs may be awarded against unsuccessful litigants, and such orders may not be enforceable against a State. In some cases, such proceedings may also raise political concerns in one or both countries. One possible response might be the creation of a "corporate vehicle" to act for the State in the recovery process. Such a vehicle might be created by the requesting State, or it could be an independent private foundation or some form of internationally sponsored entity. It would be the applicant or plaintiff in civil proceedings and, as such, the recipient of awards and the subject of judicial orders in such proceedings. Claims could be assigned or sold to it, with the transfer of any assets recovered and the funding of any liabilities incurred a matter of contract between it and the requesting country.

The use of "mentors" in asset-recovery cases

137. The United Nations system, through the United Nations Office for Drug Control and Crime Prevention, already has gained some experience by assisting countries with tracing and recovering the proceeds of crime which may be applied to the recovery of illegally transferred assets derived from large-scale corruption. In money-laundering cases, the Office has enjoyed considerable success in providing experts to requesting countries as "mentors", to assist in the development of institutions such as financial intelligence units, and with institutional or case-specific operational problems as they arise. This approach provides assistance well beyond what can be delivered in short training seminars, tends to be more closely tailored to the actual needs of the recipient countries, and has proven popular with both donors and recipients.

Issues and options relating to the funding of assistance in asset-recovery cases

138. The complexity and transnational nature of asset-recovery cases makes them expensive and time-consuming. The problem of funding tends to be particularly acute in the early stages of case development, when initial costs can be substantial, and it may not be apparent how long the case will take,

what quantities of assets are involved, and what the ultimate probability or potential of successfully recovering them will be. The prospects of ultimate success will often be determined by the ability of States to fund the investigation and litigation themselves, although their ability to do so may well have been eroded by the diversion of the same assets they seek to recover.

139. Despite the high costs of running a case, recoveries in large corruption cases would almost always be sufficient to fund the effort, even where only a small fraction of the amount allegedly diverted is actually recovered. This raises the possibility of advancing a country the funds to cover the costs of asset recovery, in the knowledge that the likelihood of the loan being returned from recovered funds is high. Several possible sources might be identified for the funding of cases:

(a) *Contingency fees*. In some cases, countries seeking to recover assets may rely on contingency agreements, where payments are contingent on recovery, and in some systems, paid in amounts proportional to the total value of assets recovered. These are a common means of funding civil litigation in some countries, but few, if any, private companies would be able to muster the resources needed to take on a large asset recovery case out of their own resources. It should be noted, however, that contingency fees are also prohibited in many countries.

(b) *A revolving fund*. A general fund could be established and operated to provide loans to countries seeking recovery of initial funds to conduct asset-recovery cases, to be later repaid from those assets actually recovered. Such a fund could be operated by the United Nations or another organization, such as the World Bank.

(c) *Loans from other countries*. Concerned or interested countries may be approached with respect to assisting in or funding cases as a matter of foreign aid in order to promote economic development and reconstruction in the country seeking recovery of assets.

(d) *Loans or other assistance from international lending institutions*. International lending institutions (IMF/World Bank) and the regional development banks could advance loans, which would be repaid to those institutions from recovered assets. It is also possible that these institutions may be willing to incorporate funding for recovery projects into larger aid packages for economic development, since substantial recoveries would positively affect the overall economic prospects of the country involved and thereby reduce the need for further aid from other sources.

(e) *Private foundations*. Many private charitable foundations exist with a strong record of support for new and original international initiatives. It would be worth exploring with those foundations the possibility of supporting countries in their efforts to recover funds of illicit origin transferred abroad.

Possible long-term role of the United Nations

140. Reflecting a general trend to hold officials, even those at the highest levels, accountable for misconduct in office, there are currently a number of major cases that involve former heads of State, or other senior officials, and very large proceeds or related assets. These cases have thus far been conducted on an ad hoc basis by the countries involved. Significant knowledge and experience has been accrued by those involved, but most of it is specific to the cases at hand. There has not been, thus far, any attempt to compare or contrast different cases or to extract general information about the legal political or practical problems encountered in such cases, best practices or other common experiences.

141. It might be possible for the United Nations to collect and analyse this body of knowledge and disseminate the experience, thus offering a very useful service to its constituency. The added value of the United Nations consists in its global nature, its background in other criminal justice areas, including transnational organized crime and money-laundering and its considerable expertise in criminal justice matters and institutions, including international cooperation.

Notes

[1] In adopting resolution 55/61 on 4 December 2000, the General Assembly recognized the desirability of an effective international legal instrument against corruption and decided to start the elaboration of such an instrument in Vienna at the headquarters of the United Nations Centre for International Crime Prevention of the United Nations Office for Drug Control and Crime Prevention. In the same resolution, the General Assembly requested the Secretary-General to prepare a report analysing all relevant international instruments, other documents and recommendations addressing corruption and asked the Commission on Crime Prevention and Criminal Justice, at its tenth session, to review and assess the report and, on that basis, to provide recommendations and guidance as to future work on the development of a legal instrument against corruption. The Assembly also requested the Secretary-General to convene an intergovernmental open-ended expert group to examine and prepare, on the basis of the above-mentioned report and of the recommendations of the Commission at its tenth session, draft terms of reference for the negotiation of the future legal instrument against corruption. The report of the Secretary-General on existing international legal instruments, recommendations and other documents addressing corruption, originally submitted to the Commission on Crime Prevention and Criminal Justice at its tenth session held in Vienna from 8 to 17 May 2001 (E/CN.15/2001/3) also served as a basis for discussions of the intergovernmental open-ended expert group.

[2] In responding to the note verbale, some Member States limited their response to the specific issue of corruption, while others expanded it to include anti-money-laundering efforts.

[3] Under this Act, an offence committed outside Malaysia by any Malaysian citizen or permanent resident may be dealt with as though such an offence was being committed anywhere within Malaysia.

[4] The activities of the United Nations Office for Drug Control and Crime Prevention and, in particular of its Centre for International Crime Prevention, against corrupt practices in general have been extensively analysed in the report of the Executive Director on the work of the United Nations Centre for International Crime Prevention, submitted to the Commission on Crime Prevention and Criminal Justice at its tenth session (E/CN.15/2001/2). In order to avoid duplication, the present report covers only those technical assistance activities of the Office aimed at preventing and combating the transfer of funds of illicit origin and at facilitating the return of such funds (see sect. II.B below).

[5] The report on the tenth session of the Commission on Crime Prevention and Criminal Justice is contained in documents E/2001/30 and Corr.1.

[6] In its resolution 55/61, the General Assembly requested the Secretary-General to convene an intergovernmental open-ended expert group to examine and prepare draft terms of reference for the negotiation of the future legal instrument against corruption. In its resolution 55/188, the General Assembly invited the open-ended expert group to examine the question of illegally transferred funds and the repatriation of such funds to their countries of origin.

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General and complete disarmament

Nuclear disarmament*

Note by the Secretary-General

1. At its fifty-fifth session, the General Assembly adopted resolution 55/33 T of 20 November 2000, entitled "Nuclear disarmament", in paragraph 17 of which it requested the Secretary-General to submit a report on the implementation of the resolution to the fifty-sixth session of the General Assembly. The present note is submitted pursuant to that request.

2. The Secretary-General recalls the commitment made by world leaders at the United Nations Millennium Summit held in September 2000 to "strive for the elimination of weapons of mass destruction, particularly nuclear weapons" and the agreements reached by the States parties to the Treaty on the Non-Proliferation of Nuclear Weapons in May 2000 on the "practical steps for the systematic and progressive efforts" on nuclear disarmament as well as the unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament. Nevertheless, the pace of implementation of these declarations remains disappointingly slow. It is important that the international community take the necessary steps to achieve progress in the area of nuclear disarmament and non-proliferation.

3. Arms control and disarmament agreements play an essential role in the pursuit of nuclear disarmament. Strengthening such agreements and thus making further progress towards nuclear disarmament require actions at all levels. Several multilateral agreements still await either their entry into force or their effective implementation and their universality. There is also concern about the future of some important arms control and disarmament agreements.

4. The Secretary-General remains concerned at the continuing impasse in the Conference on Disarmament, notwithstanding the proposals put forward by delegations to agree on a programme of work to deal with the most pressing issues in the field of nuclear disarmament and other issues. He calls upon all the Member

* Finalization of the report was dependent on the outcome of the 2001 session of the Conference on Disarmament.

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States of the Conference to further enhance their efforts to overcome the divergence of views so as to allow the Conference to reach solutions on the outstanding issues and to ensure that the credibility of the Conference, as the single multilateral disarmament negotiating body, is reinforced.